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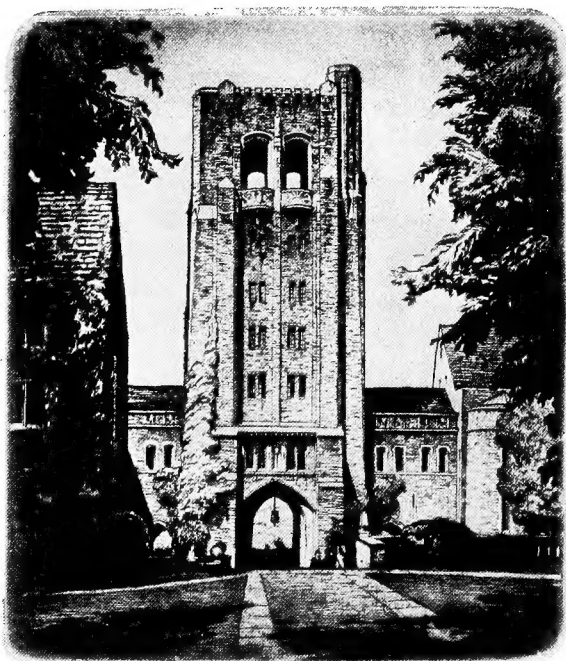
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Winslow's forms of pleading and practice

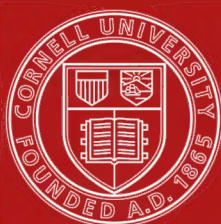


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WINSLOW'S FORMS
OF
PLEADING AND PRACTICE
UNDER THE CODE

**FOR USE IN ALL CODE STATES, AND SPECIALLY ADAPTED TO
MEET THE REQUIREMENTS OF THE LAWS OF WIS-
CONSIN, MINNESOTA, IOWA, NORTH DAKOTA,
SOUTH DAKOTA AND NEBRASKA**

WITH NOTES

BY
JOHN B. WINSLOW, LL. D.
JUSTICE SUPREME COURT OF WISCONSIN

IN TWO VOLUMES

VOLUME I

CHICAGO
T. H. FLOOD AND COMPANY
1906

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BY
JOHN B. WINSLOW

STATE JOURNAL PRINTING COMPANY,
PRINTERS AND STEREOTYPERS,
MADISON, WIS.

PREFACE.

The only claim made for this book is that it is a collection of forms which will be useful to the lawyer practicing in a code state. It is not a textbook, nor a treatise on pleading or practice; hence, the notes are not voluminous but are chiefly confined to such explanations and suggestions as seem necessary to insure the proper understanding and use of the forms.

The book follows quite closely the general arrangement of the original edition of Abbott's Forms, which is probably the most widely useful form book which the code lawyer has yet had. Many of the forms contained in that work have been inserted herein without change, and many with such slight changes as are made necessary by differences in the statutes, and to these have been added forms adapted from other standard works, as well as many which have been sustained by the courts in actual practice.

While care has been exercised to obtain accuracy, it is fully realized that some mistakes and omissions are inevitable, and the author will be glad to be notified of any such errors which may be found by his brethren of the profession.

The work has been carried through the press by Mr. Arthur F. Belitz, of the Wisconsin bar, who also prepared the very copious index.

JOHN B. WINSLOW.

Madison, Wis., September, 1906.

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PART I.

FORMS ANTECEDENT AND ANCILLARY
TO AND INITIATING ACTIONS.

CHAPTER I.

CAPTIONS, CONCLUSIONS, AND ACKNOWLEDGMENTS.

- | | |
|---|---|
| <ol style="list-style-type: none">1. Caption of preliminary petition to a judge.2. The same, to the court.3. Caption of special proceeding.4. Common caption of paper in an action, except an order or judgment; Wisconsin.5. The same; Minnesota, North Dakota.6. The same; Iowa and Nebraska.7. Caption of order of court.8. Formal parts of affidavit in an action.9. The same, by two or more affiants.10. Jurat, affiant blind or illiterate.11. Jurat, affiant a foreigner.12. Authentication of official character of officer taking affidavit without the state for use within the state.13. Jurat taken before commissioner without the state.14. Acknowledgment, common form within state.15. Acknowledgment, by officers of a corporation.16. Acknowledgment, by attorney in fact.17. Acknowledgment of conveyance; Wisconsin statutory form.18. Acknowledgment taken out of the state to be used in Wisconsin.19. Authentication of acknowledgment taken in another state for use in Wisconsin. | <ol style="list-style-type: none">20. Acknowledgment; Iowa statutory form.21. Acknowledgment by attorney in fact; Iowa statutory form.22. Acknowledgment by officer of a corporation; Iowa statutory form.23. Authentication of acknowledgment taken in another state for use in Iowa.24. Acknowledgment; Minnesota statutory form.25. Acknowledgment by attorney in fact; Minnesota and Missouri form.26. Acknowledgment by officer of corporation or joint stock association; Minnesota and Missouri form.27. Authentication of acknowledgment taken in another state for use in Minnesota.28. Acknowledgment; North and South Dakota statutory form.29. The same, by corporation.30. The same, by attorney in fact.31. Authentication when acknowledgment is taken before a justice of the peace; North and South Dakota.32. Authentication of acknowledgment taken outside of state for use in Nebraska.33. Acknowledgment; Illinois statutory form.34. Admission of due service.35. Simple admission of service, not conceding it to be timely. |
|---|---|

In this chapter will be found forms of captions and conclusions in common use for ordinary legal papers. To these have

been added forms of acknowledgments and the proper authentication thereof, for the reason that in many states all written instruments, excepting in some states wills and bills and notes, may be read in evidence when acknowledged in the manner provided by law for conveyances of real estate.

As a general rule acknowledgments are regulated by the statutes of the particular states, and as an acknowledgment is purely a statutory matter, the greatest care should be taken to follow the particular statute. This is especially necessary in view of the fact that in order to entitle instruments to record, a certificate of acknowledgment in accordance with law is generally absolutely necessary; and, of course, the same is true where the statutes provide that instruments which are acknowledged may be introduced in evidence.

The statutes in the various states covered by this work are cited in the following paragraph.

Iowa Code sec. 4621 (every private writing except a will); Id. sec. 4629 (instruments affecting real property, or the adoption of minors); Howell's Stats. of Mich. sec. 7503; Minn. Rev. Laws 1905 sec. 4710 (except bills and notes and wills); Id. sec. 4737 (deeds); N. Y. Code Civ. Pro. sec. 937 (except bills and notes and wills); Id. sec. 935 (conveyances); Cobbey's Ann. Stats. of Nebr. sec. 1332 (private writings); Id. sec. 10213 (deeds); Wis. Stats. 1898 sec. 4185 (except bills and notes and wills); Id. sec. 4156 (instruments affecting real property); S. Dak. Rev. Code C. P. sec. 533 (requires recording of the instrument as well as acknowledgment); N. Dak. Rev. Codes sec. 5696 (instruments affecting real property).

1. Caption of preliminary petition to a judge.

To the Honorable A.... B...., Circuit Judge [*or District Judge, or other official title of the judge addressed*] of the Judicial Circuit [*or District*] of the state of [*or otherwise give full legal title of the court*].

THE PETITION of L.... M...., of the city of, state of, respectfully shows that [*proceed with statement of facts*].

2. The same, to the court.

To the Circuit Court [*or District Court*] of the Judicial Circuit [*or District*] of the state of

THE PETITION of L.... M...., of the city of, in said state, respectfully shows that [*proceed with statement of facts*].

3. Caption of special proceeding.

STATE OF

In Circuit Court¹ for CountyIn the matter of the application
ofA.... B...., an infant, for leave to
sell certain real estate [*or other-
wise name the character of the pro-
ceeding*].To the Court
for County.THE PETITION of L.... M...., of the city of,
state of, respectfully represents to the court [*or other
matter according to the nature of the paper*].**4. Common caption of paper in an action, except an order or judgment.²**

STATE OF

In Circuit Court³ for CountyA.... B.... and C.... D....,
Plaintiffs,

vs.

E.... F.... and G.... H....,
Defendants.**5. The same; Minnesota and North Dakota.**

STATE OF

County of

DISTRICT COURT

..... JUDICIAL DISTRICT.

A.... B....,

Plaintiff,

vs.

C.... D....,

Defendant.

¹ Or "In District Court."² A caption substantially in this form will be generally sufficient for papers in an action. There are some instances where the statutes make special requirements as

to the caption of particular papers, and these will be found noted later in this work in connection with the form given for that particular paper.

³ Or "In District Court."

6. The same; Iowa and Nebraska.

IN THE DISTRICT COURT FOR COUNTY

State of

A.... B....,		}
	Plaintiff,	
vs.		
C.... D....,		}
	Defendant.	

7. Caption of order of court.

AT A GENERAL [*or* SPECIAL] TERM of the District [*or* Circuit] Court in and for County, State of, begun and held at the Court House in the City of, in said County and on the day of, 19..

PRESENT, Hon. O.... P...., District [*or* Circuit] Judge, Presiding.

A.... B....,		}
	Plaintiff,	
vs.		
C.... D....,		}
	Defendant.	

8. Formal parts of affidavit in an action.⁴[*Title of court and cause.*]

City of }
 County of } ss.

A.... B...., being duly sworn, says he is the plaintiff [*or defendant, or the attorney or agent of the plaintiff or defendant*] in the above entitled action, and that [*here state facts to be sworn to*].

A.... B....

Subscribed and sworn to before me
 this day of 19..

C.... D....

Notary Public

..... County.

⁴ An affidavit when made to be used in an action should always be properly entitled in the action. In some states, however, the omission is not fatal if the affidavit intelligibly refers to the action. Minn. Rev. Laws 1905 sec. 4120; N. Dak. Rev. Codes sec. 5737; S.

Dak. Rev. Code C. P. sec. 566; Wis. Stats. 1898 sec. 2836. It should always contain the venue, be signed by the affiant, and the jurat should state the day on which it was taken and be subscribed by the officer with his official title.

9. The same, by two or more affiants.[*Title of court and cause.*][*Venue.*]

A.... B.... and C.... D...., being severally duly sworn,
each for himself says [*here state facts to be sworn to*].

A.... B....

C.... D....

[*Jurat as in Form 8.*]**10. Jurat, affiant blind or illiterate.⁵**

Subscribed and sworn to before me
this day of, 19.., the
same having been by me read to the
affiant, he being blind [*or unable to
read*] and he appearing to me to fully
understand the same.

C.... D....

Notary Public

..... County.

11. Jurat, affiant a foreigner.

Subscribed and sworn to before me
this day of, 19.., I hav-
ing first sworn E.... F...., an in-
terpreter, to interpret truly the same
to the deponent, who is a foreigner
not understanding the English lan-
guage and he having interpreted the
same to the affiant, who appeared to
me to understand the same.

C.... D....

Notary Public

..... County.

12. Authentication of official character of officer taking affidavit without the state for use within the state.⁶[*Venue.*]

I, A.... B...., who am a clerk [*or prothonotary*] of the
..... court of county, in said state, do hereby certify

⁵ This and the following form may be used in the cases indicated, and are based on 1 Tidd's Pr. (9th ed.). It is believed, however, that the general form is sufficient proof *prima facie* that

the contents of the paper were properly explained to and understood by the affiant and that the oath was properly administered.

⁶ The statutes of the various states differ considerably as to the

that said court is a court of record having a seal, and that C.... D...., Esq., whose name is subscribed to the jurat of the foregoing affidavit was at the date of said jurat a notary public in and for said state [*or other official, giving his proper title*] duly appointed, qualified and acting, and was by the laws of said state duly authorized to take said affidavit and to administer oaths; that I am well acquainted with the handwriting of the said C.... D.... and verily believe his signature attached to said jurat to be genuine.

WITNESS my hand and the seal of said court, at the city of in said county and state, this day of, 19..

A.... B....

[SEAL OF COURT]

Clerk of the Court of
County, State of

13. Jurat taken before commissioner without the state.

The above affidavit was subscribed and sworn to before me the undersigned, a commissioner for the state of residing at in the state of this day of, 19..

[*Signature and title of
commissioner.*]

[OFFICIAL]

[SEAL]

[*Add authentication of secretary of state if required. It is not generally necessary.*]

necessity of authentication of the signature of an officer taking an affidavit in a foreign state. Generally, though not universally, the certificate of a notary public, under his official seal, requires no further authentication. In some states it is provided that affidavits may be taken without the state before any officer authorized to administer oaths, and no requirement as to authentication appears to be made. S. Dak. Rev. Code C. P. sec. 508; N. Dak. Rev. Codes sec. 5670; Iowa Code sec. 4674; Cobbey's Ann. Stats. of Nebr. sec. 1356; Gen. Stats. Kans. 1901 sec. 4806. Depositions do not require authentication if the officer before

whom they are taken has an official seal. S. Dak. Rev. Code C. P. sec. 526; N. Dak. Rev. Codes sec. 5683; Iowa Code sec. 4702; Cobbey's Ann. Stats. of Nebr. sec. 1369; Gen. Stats. Kans. 1901 sec. 4819. In Wisconsin a notary's jurat with seal requires no authentication, but others must be authenticated. Wis. Stats. 1898 sec. 4203. In Minnesota the jurat of a notary or commissioner of deeds requires no authentication, but the jurats of other officers must be authenticated. Minn. Rev. Laws 1905 sec. 4684. As to New York see N. Y. Code Civ. Pro. sec. 844; Abbott's New Pr. and Forms, vol. 1 p. 35 *et seq.*

14. Acknowledgment, common form within state.⁷

[Venue.]

On this day of, 19.., before me personally appeared A.... B.... [and C.... D....] known to me to be the person [or the persons, or one of the persons] named in and who executed the within [or foregoing] instrument, and acknowledged [or severally acknowledged] that he [or they] executed the same as his [or their] free and voluntary act and deed, for the uses and purposes therein set forth.

[OFFICIAL SEAL]

[if officer has one.]

E.... F....

[Add official title.]

15. Acknowledgment by officers of a corporation.

[Venue as in Form 14.]

On this day of, 19.., before me personally appeared A.... B.... and C.... D.... to me personally known to be the persons who signed the foregoing instrument, who being by me each duly sworn [or affirmed] did say that he, the said A.... B.... is president [or other officer or agent] and that he, the said C.... D.... is the secretary [or clerk] thereof, and that the seal affixed to the foregoing instrument is the corporate seal of said corporation, and that he, the said A.... B.... signed and executed the said instrument as president [or other officer or agent] of said corporation and he, the said C.... D.... counter-signed the same as secretary [or clerk] thereof, and that they caused the corporate seal of said corporation to be affixed thereto on behalf of said corporation by authority of its board of directors [or trustees], and the said A.... B.... and C.... D.... severally acknowledged that they executed said instrument by and on behalf of said corporation as its free and voluntary act and deed.

[OFFICIAL SEAL]

E.... F....

[Add official title.]

16. Acknowledgment, by attorney in fact.

[Venue as in Form 14.]

On this day of, 19.., before me personally appeared A.... B...., to me personally known, and acknowledged

⁷ This form and Forms 15 and 16 will generally be found sufficient for use in the code states, although certain statutory forms are given in Form 20 *et seq.* In Nebraska there are no statutory

forms prescribed, and Forms 14, 15 and 16 may be used. In that state the acknowledgment must be taken within the state before the judge or clerk of any court, a justice of the peace or a notary pub-

that he executed the foregoing instrument as the voluntary act and deed of C.... D...., the grantor therein described, by virtue of a power of attorney duly executed by the said C.... D...., to said A.... B...., dated, 19.., and recorded in the office of the register of deeds [*or other proper officer*] of the county of on the day of, 19.., in volume on page [*or if the power of attorney be not recorded, which power of attorney was exhibited to me for my inspection at the time of this acknowledgment and appeared to me to have been duly executed by the said C.... D.... and to contain due authority to the said A.... B.... authorizing him to execute and acknowledge the foregoing instrument*].

E.... F....

[OFFICIAL SEAL]

[*Add official title.*]

17. Acknowledgment of conveyance; Wisconsin statutory form.⁸

[*Venue.*]

Personally came before me this day of, 19.., the above [*or within*] named A.... B.... and C.... D...., his wife⁹ [*or if an officer, adding the name of his office*], to me known to be the person who executed the foregoing [*or within*] instrument, and acknowledged the same.

E.... F....

[OFFICIAL SEAL]

[*Insert designation of officer.*][*if officer has one.*]

18. Acknowledgment taken out of the state to be used in Wisconsin.

[Under Wis. Stats. 1898 secs. 2218 and 2219 a conveyance executed in any other state may be acknowledged and certified as prescribed by the laws of Wisconsin, in which case Form 17 should be used, or it may be executed and acknowledged according to the laws of the state, territory or district in which it is executed, in which latter case the certificate of acknowledgment

lic, acting respectively within their territorial jurisdiction; if without the state and within the United States, the deed must be executed, acknowledged and proved either according to the law of such other state or in accordance with the law of Nebraska, and the acknowledgment must be taken before any officer authorized by the laws of such other state to take acknowledgments of deeds

or by a commissioner of deeds for Nebraska. Cobbey's Ann. Stats. of Nebr. secs. 10202 and 10203.

⁸ Wis. Stats. 1898 sec. 2217. If the acknowledgment is taken by a notary public it must be attested by a clear impression of his seal, and in addition thereto must be written or stamped the day, month and year when his commission will expire. Laws 1901 c. 38.

⁹ The acknowledgment of a

proper in such other state or territory should be used, adding thereto the following clause]:

And I certify that the said deed [or instrument] is executed and acknowledged according to the laws of the state of

E.... F....

[OFFICIAL SEAL]

[Add official title.]

19. Authentication of acknowledgment taken in another state for use in Wisconsin.¹⁰

[Venue.]

I, A.... B...., who am clerk [or prothonotary] of the court of county, in said state, do hereby certify that said court is a court of record having a seal, and that E.... F...., Esq., whose name is subscribed to the foregoing certificate of acknowledgment was at the date thereof a justice of the peace in and for said county [or other official, giving his proper title] duly qualified and acting and duly authorized to take such acknowledgment, and that I believe the signature of said E.... F.... to said certificate to be genuine, and [if the conveyance be executed and acknowledged according to the laws of such foreign state] that said deed [or instrument] is executed and acknowledged according to the laws of said state of

WITNESS my hand and official seal this day of, 19..

[SEAL OF COURT]

A.... B....

Clerk of the Court
for the county of
State of

20. Acknowledgment, Iowa statutory form.¹¹

[Venue.]

On this day of, 19.., before me personally appeared A.... B.... [or A.... B.... and C.... D....] to me known to be the person [or persons] named in and who executed the foregoing instrument, and acknowledged that he [or they] executed the same as his [or their] voluntary act and deed.

L.... M....

[OFFICIAL SEAL]

[if officer has one.]

Notary Public in and
for said County.

married woman in Wisconsin may be taken and certified in the same manner as if she were sole. Wis. Stats. 1898 sec. 2221.

¹⁰ This authentication is unnecessary if the acknowledgment be taken before a commissioner of deeds for Wisconsin, a clerk of a

court of record, or a notary public with seal attached, or the commanding officer of a military post of the United States, within his jurisdiction; but if taken before any other officer it is essential. Wis. Stats. 1898 sec. 2219.

¹¹ This and the two following

21. Acknowledgment by attorney in fact, Iowa statutory form.

[Venue.]

On this day of, 19..., before me personally appeared A.... B.... to me known to be the person who executed the foregoing instrument in behalf of C.... D.... and acknowledged that he executed the same as the voluntary act and deed of the said C.... D....

L.... M....

[OFFICIAL SEAL]

[Add official title.]

[if officer has one.]

22. Acknowledgment by officer of a corporation; Iowa statutory form.

[Venue.]

On this day of, 19..., before me appeared A.... B.... to me personally known, being by me duly sworn [or affirmed] did say that he is the president [or other officer or agent of the corporation or association] of [describing the corporation or association] and that the seal affixed to said instrument is the corporate seal of said corporation [or association] and that said instrument was signed and sealed in behalf of said corporation [or association] by authority of its board of directors [or trustees] and said A.... B.... acknowledged said instrument to be the voluntary act and deed of said corporation [or association]. [In case of no corporate seal, omit the words, "the seal affixed, &c" and add at the end of the affidavit clause the words "and that said corporation,—or association—has no corporate seal"].

C.... D....

[OFFICIAL SEAL]

[Add official title.]

[if officer has one.]

23. Authentication of acknowledgment taken in another state for use in Iowa.¹²

[Venue.]

I, E.... F...., clerk of the court in and for said county, which court is a court of record having a seal, [or, I,

forms are prescribed by Iowa Code sec. 2959. The acknowledgment of a married woman may be taken in the same form as if she were sole. Id. sec. 2960.

¹² Iowa Code, secs. 2943, 2944, 2945, and 2946. Acknowledgments in another state for use in Iowa may be taken before a judge of a court of record or officer holding the seal thereof, a commissioner

of deeds for Iowa, a notary public or justice of the peace, or before any other officer of such state authorized to take the acknowledgment of deeds, but in all cases there must be attached an authentication by the secretary of state or clerk of a court of record with a seal, substantially in compliance with this form.

E.... F...., secretary of state *of such state or territory*] do hereby certify that C.... D.... by and before whom the foregoing acknowledgment [*or proof*] was taken, was at the time of taking the same a notary public [*or other officer*] residing [*or authorized to act*] in said county, and was duly authorized by the laws of said state [*territory or district*] to take and certify acknowledgments or proofs of deeds of lands in said state [*territory or district*] and that said conveyance and acknowledgment thereof are in due form of law; and further, that I am well acquainted with the handwriting of said C.... D...., and that I verily believe that the signature to said certificate of acknowledgment [*or proof*] is genuine.

IN TESTIMONY whereof, I have hereunto set my hand and affixed the seal of the said court [*or state*] this day of, 19..

[SEAL]

E.... F....
[*Add official title.*]

24. Acknowledgment; Minnesota statutory form.¹³

[*Venue.*]

On this day of, 19.., before me personally appeared A.... B.... [*or A.... B.... and C.... D....*] to me known to be the person [*or persons*] described in and who executed the foregoing instrument, and acknowledged that he [*or they*] executed the same as his [*or their*] free act and deed.

[OFFICIAL SEAL]
[*if officer has one.*] ¹⁴

E.... F....
[*Official title.*]

25. Acknowledgment by attorney in fact; Minnesota and Missouri form.

[*Venue.*]

On this day of, 19.., before me appeared A.... B.... to me known to be the person who executed the foregoing instrument in behalf of C.... D.... and acknowledged that he executed the same as the free act and deed of the said C.... D....

[OFFICIAL SEAL]
[*if officer has one.*]

E.... F....
[*Official title.*]

¹³ This form and the two immediately following are prescribed by Minn. Rev. Laws 1905 sec. 2684, and Mo. R. S. 1889 sec. 2408. When a married woman unites with her husband the acknowl-

edgment is in the same form, she being described as his wife; no separate examination is required in either Minnesota or Missouri.

¹⁴ Notaries public having an official seal are required to affix it

26. Acknowledgment by officer of a corporation or joint stock association; Minnesota and Missouri form.

[*Venue.*]

On this day of, 19.., before me appeared A.... B.... to me personally known, who being by me duly sworn [*or affirmed*] did say that he is the president [*or other officer or agent of the corporation or association*] of [*describing the corporation or association*] and that the seal affixed to said instrument is the corporate seal of said corporation [*or association*] and that said instrument was signed and sealed in behalf of said corporation [*or association*] by authority of its board of directors [*or trustees*] and said A.... B.... acknowledged said instrument to be the free act and deed of said corporation [*or association*]. [*In case the corporation or association has no seal, omit the words "the seal affixed to said instrument is the corporate seal of said corporation—or association—and that," and add at the end of the affidavit clause the words "and that said corporation—or association—has no corporate seal"*].

[OFFICIAL SEAL]
[*if officer has one.*]

E.... F....
[*Add official title.*]

27. Authentication of acknowledgment taken in another state for use in Minnesota.¹⁵

[*Venue.*]

I, A.... B...., who am clerk [*or other proper certifying officer*] of the court of county, in said state, do hereby

to the acknowledgment. Minn. Rev. Laws 1905 sec. 2658. Mo. R. S. 1889 sec. 2406.

¹⁵ Acknowledgments of deeds for use in Minnesota may be taken in any other part of the United States before any of the justices of the supreme court of the United States, or any of the district judges of the United States, or any judge of any supreme, superior, circuit or any other court of record of any state, territory, or district, acting within his jurisdiction, or before the clerks of any of such courts, or before a notary public, justice of the peace, or a commissioner of deeds for Minnesota within the territory for which he is appointed; but if taken before any officer not hav-

ing an official seal affixed to the certificate there must be an authentication of his official character attached in substantially this form. Minn. Rev. Laws 1905 secs. 2688, 2689, 4684. Acknowledgments for use in Missouri may be taken within the state by the judge, justice or clerk of a court having a seal, a notary public, or justice of the peace of the county in which the land conveyed is situated; without the state and within the United States, by any notary public, or by any United States or state court having a seal, or by the clerk thereof, or by any commissioner of deeds for Missouri; without the United States by any court having a seal, the mayor or chief officer of any

certify that said court is a court of record having a seal, and that C.... D.... Esq., whose name is subscribed to the foregoing certificate of acknowledgment, was at the date thereof a justice of the peace in and for said county [*or other official, giving his proper title*] duly qualified and acting and duly authorized to take such acknowledgment, and that I verily believe the signature of said C.... D.... subscribed to said certificate of acknowledgment to be genuine.

WITNESS my hand and official seal this day of, 19..

[SEAL OF COURT].

A.... B....
[*Add official title.*]

28. Acknowledgment; North and South Dakota statutory form.¹⁶

[*Venue.*]

On this day of, in the year 19.., before me personally appeared A.... B.... known to me [*or proved to me on the oath of C.... D....*] to be the person who is described in and who executed the within instrument, and acknowledged to me that he [*or they*] executed the same.

[OFFICIAL SEAL]
[*if officer has one.*]

E.... F....
[*Add official title.*]

29. The same, by corporation.

[*Venue.*]

On this day of in the year 19.. before me [*here insert the name and quality of the officer*] personally appeared A.... B.... known to me [*or proved to me on the oath of C.... D....*] to be the president [*or the secretary*] of the corporation that is described in and that executed the within instrument, and acknowledged to me that such corporation executed the same.

[OFFICIAL SEAL]
[*if officer has one.*]

E.... F....
[*Add official title.*]

30. The same, by attorney in fact.

[*Venue.*]

On this day of, in the year 19.., before me [*here insert the name and quality of the officer*] personally appeared

city or town having a seal, or notary public having a seal, or by any minister or consular officer of the United States. Mo. R. S. 1889 sec. 2403.

¹⁶ N. Dak. Rev. Codes sec. 3584; S. Dak. Rev. Civ. Code sec. 981. This form and the two immediately following are prescribed by the statutes of both North and South Dakota, and are identical.

A.... B.... known to me [*or proved to me on the oath of C.... D....*] to be the person who is described in and whose name is subscribed to the within instrument as the attorney in fact of I.... K...., and acknowledged to me that he subscribed the name of I.... K.... thereto as principal and his own name as attorney in fact.

[OFFICIAL SEAL]
[*if officer has one.*]

E.... F....
[*Add official title.*]

31. Authentication when acknowledgment is taken before a justice of the peace; North and South Dakota.¹⁷

[*Venue.*]

I, A.... B...., who am clerk of the court in and for county in said state, which is a court of record having a seal, do hereby certify that C.... D...., whose name is subscribed to the foregoing certificate of acknowledgment was at the time of the taking of such acknowledgment a justice of the peace residing in said county and was at said time duly authorized to take such acknowledgment, and further that I am acquainted with his handwriting and believe that the signature attached to said original certificate is genuine.

WITNESS my hand and the seal of said court this day of, 19..

[SEAL OF COURT]

A.... B....
[*Add official title.*]

¹⁷ By the laws of both North and South Dakota an acknowledgment within the state may be taken before a notary public, justice or clerk of the supreme court, the judge or clerk of a court of record, the mayor of a city, a register of deeds, justice of the peace, a United States circuit or district court commissioner, a county clerk, or a county auditor; when taken without the state and within the United States, it may be taken before the following officers within their respective jurisdictions: viz, a justice, judge, or clerk of any United States or state court of record, a notary public, any officer authorized by the laws of such state to take acknowledg-

ments, or a commissioner of deeds appointed for the purpose by the governor of the home state. N. Dak. Rev. Codes secs. 3573, 3574, 3575; S. Dak. Rev. Civ. Code secs. 970, 971, 972. If made before a justice of the peace for use in another county it must have attached a certificate substantially in this form; but other officers are simply required to affix their signatures with their official titles and seals, the mayors of cities affixing the seal of the city. N. Dak. Rev. Codes sec. 3586; S. Dak. Rev. Civ. Code sec. 981, subd. 5. The acknowledgment of a married woman is taken and certified in the same manner as if she were sole.

32. Authentication of acknowledgment taken outside of state for use in Nebraska.¹⁸

[*Venue.*]

I, A.... B...., who am clerk of the court of county in said state do hereby certify that said court is a court of record having a seal, and that E.... F...., Esq., whose name is subscribed to the foregoing certificate of acknowledgment was at the date thereof a justice of the peace in and for said county [*or other officer, giving his official title*] duly qualified and acting and duly qualified to take such acknowledgment; and that I am well acquainted with the handwriting of such officer and believe the said signature of said E.... F...., which is attached to said certificate, to be genuine; and I further certify that said deed [*or other instrument*] is executed or acknowledged according to the laws of [*name the state or territory in which the acknowledgment is taken*].

WITNESS my hand and official seal this day of, 19..

[SEAL OF COURT]

A.... B....
[*Add official title.*]

33. Acknowledgment; Illinois statutory form.¹⁹

[*Venue.*]

I, [*here give name of officer and his official title*] do hereby certify that [*name of grantor, and if acknowledged by wife her name and add "his wife"*] personally known to me to be the same person whose name is [*or are*] subscribed to the foregoing

¹⁸ Cobbeys' Ann. Stats. of Nebr. sec. 10205. If the acknowledgment is taken before a commissioner of deeds for Nebraska, a notary public or other officer using an official seal, this authentication is unnecessary, but in all other cases it is required.

¹⁹ Ill. R. S. 1897 ch. 30 sec. 26. By the statutes of Illinois (R. S. 1897 ch. 30 sec. 20) an acknowledgment taken within that state must be before a master in chancery, notary public, United States commissioner, circuit or county clerk, justice of the peace, any court of record having a seal or the judge, justice or clerk of any such court; when taken before an officer or clerk having a seal the

seal must be attached; if taken before a justice of the peace there must be attached a certificate of the county clerk that the officer was a justice of the peace in the county at the time of taking the same, except in case the justice of the peace resides in the county where the lands are situated no such certificate is necessary. If the acknowledgment be taken without the state and within the United States it may be taken before a justice of the peace, notary public, United States commissioner, commissioner of deeds, mayor of a city, clerk of a county, or before any judge, justice or clerk of any state or United States court of record. Seal must be at-

instrument appeared before me this day in person, and acknowledged that he [she or they] signed, sealed and delivered the said instrument as his [her or their] free and voluntary act for the uses and purposes therein set forth.

Given under my hand and [private or official as the case may be] seal this day of, 19..

[Signature of officer] [Seal]

34. Admission of due service.

Due and timely service of the within [give name of paper] is hereby admitted this day of, 19..

A.... B....

Attorney for

[Add acknowledgment if the admission is made by a person not an attorney.]

35. Simple admission, not conceding it to be timely.

Service of the within [give name of paper] is hereby admitted this day of, 19..

A.... B....

Attorney for

[Add acknowledgment if necessary.]

tached if the officer has one, and in case of a justice of the peace there must be the certificate of the proper clerk under his official seal that the officer before whom the acknowledgment was made was a justice of the peace at the time

of making the same. An acknowledgment in a foreign state may be made in conformity with the laws of that state, but in that case a clerk of the court of record of such state must certify to that fact under his hand and seal.

CHAPTER II.

PROCEEDINGS BEFORE AN ACTION.

- | | |
|--|---|
| <p>36. Assignment of contract; general form.</p> <p>37. Assignments of unliquidated claims.</p> <p>38. Attorney's authority; general form.</p> <p>39. Claim against estate of deceased person.</p> <p>40. The same, by agent or attorney.</p> <p>41. Contingent claim against estate.</p> <p>42. Claim for personal injuries, against municipal corporation.</p> <p>43. Another form; sidewalk injury.</p> <p>44. Notice of claim against city.</p> <p>45. Statement of claim for personal injury to be laid before town board of audit (Wisconsin).</p> <p>46. Notice of claim against railroad company for stock killed (Wisconsin).</p> | <p>47. Claim for stock killed, another form, defective fencing (Wisconsin).</p> <p>48. The same, for fire set by locomotive (Wisconsin).</p> <p>49. The same, another form (Wisconsin).</p> <p>50. Notice and affidavit of killing stock by railroad company (Iowa and Nebraska).</p> <p>50a. Notice of personal injuries (Wisconsin).</p> <p>51. Notice of application for appraisal of stock killed or injured by railroad company (South Dakota).</p> <p>52. Appointment of appraisers to assess damages for live stock killed or crippled (South Dakota).</p> <p>53. Oath of appraisers of live stock killed or crippled (South Dakota).</p> <p>54. Report of appraisers of live stock killed or crippled (South Dakota).</p> |
|--|---|

36. Assignment of contract; general form.¹

FOR VALUE RECEIVED [*or IN CONSIDERATION OF* dollars received]² I hereby assign and transfer to C.... D..., of* the within [*or annexed*] note [*or contract, lease, account, due-bill or bond*] [*if contract is not attached describe it fully*] together with all sums due or to grow due me thereon, with interest, and all rights of action thereon [*if covenant as to amount due is desired add*]: and I hereby covenant

¹ No set form of words is essential; if the words used clearly show a transfer of interest to the assignee it is sufficient.

² The debtor cannot question the consideration. *Crowns v. Forest Land Co.*, 99 Wis. 10 s.c. 74 N. W. 546.

that there is due thereon dollars with interest from
....., 19..

WITNESS my hand and seal this day of, 19..

A.... B.... [Seal]³

In Presence of:

E.... F....

G.... H....

37. Assignments of unliquidated claims.⁴

[*Proceed as in Form 36 down to the * and add*]:

[*For the unlawful conversion of personal property*]: all claims and demands owned by me against E.... F.... and arising out of the unlawful conversion by said E.... F.... of one certain lumber wagon, together with all rights of action accruing to me by reason of such conversion.

[*For breach of covenant*]: all claims and demands for damages caused by the breach of the covenant against incumbrances [*or other covenant, naming it*] contained in a certain deed of real estate in the city of, state of, executed by E.... F...., of, to me, dated, 19.., and recorded in volume of deeds on page in the office of the register of deeds [*or clerk or other proper officer*] of the county of

[*For damages arising from fraud affecting personal property*]: all my right, title and interest in ten certain shares of the company, numbered from one to ten inclusive, now owned by me,

³ Seal unnecessary unless contract assigned affects real property.

⁴ The general rule now is that causes of action which survive are assignable. At common law as a general rule all causes of action arising out of contract (except purely personal contracts) survived, while causes of action founded on tort did not and, hence, were not assignable. The statutes of all or nearly all of the states have changed this rule, and it is now generally true that all causes of action founded on torts to property, real or personal, survive. Pomeroy, *Code Remedies*, sec. 147 *et seq.*; see Bliss, *Code Pleading*, sec. 39 *et seq.*, where the statutes of various code states are given. In Iowa and Wisconsin, at least, a right

of action for tortious injuries to the person is assignable. Kinne's Pl. & Pr. sec. 56; *Lehman v. Farwell*, 95 Wis. 185 s.c. 70 N. W. 170. But a claim for damages resulting from a mere conspiracy to defraud not resulting in damage to any property is not assignable. *Farwell Co. v. Wolf*, 96 Wis. 10 s.c. 70 N. W. 289. See on this subject 2 A. & E. Ency. of Law, 2d ed., art. Assignments, p. 1007; *Traer v. Clews*, 115 U. S. 528. See also the statutes as to survival of causes of action in the various states: N. Y., 2 Rev. Stats. secs. 447, 448; Wis. Stats. 1898 sec. 4253; Minn. Rev. Laws 1905 sec. 4502; Iowa Code sec. 3443; Mo. R. S. 1889 secs. 96, 97; Cobbe's Ann. Stats. of Nebr. secs. 1444, 1445.

together with all claims and demands of every nature which I may have or be entitled to against any and all persons on account of any fraud or deceit practiced upon me and by reason of which my subscription to said stock was obtained [*or by reason of which said stock has been rendered less valuable*].

[*For a share of the profits of a joint enterprise*]: all claims and demands owned by me arising out of a joint adventure with one E.... F.... in the purchase and sale of a certain herd of cattle on or about, 19.., together with all rights of action accruing to me on account thereof.

[*For a personal injury*]: all claims and demands owned by me against any and all persons and corporations arising out of the loss of my right arm on or about, 19.., which loss was directly caused by the negligence [*or wrongful acts*] of the company, their agents and servants.

[*For false return*]: all claims and demands arising out of the neglect of E.... F...., sheriff of county to make return within the time required by law of an execution against property upon a judgment in the action of A.... B.... vs. C.... D...., and also all demands resulting from the making of a false return by said sheriff to said execution.

[*Close in each case as follows*]:

WITNESS my hand and seal this day of, 19..

A.... B.... [Seal]

In Presence of:

G.... H....

I.... K....

38. Attorney's authority; general form.⁵

I, A.... B...., hereby authorize C.... D...., attorney at law, to bring and prosecute an action in my name in the courts of the state of to recover possession of that certain piece or parcel of land described as follows [*insert description*].

[*General authority to bring actions*]: to bring and prosecute all actions and proceedings in my name in the courts of the state of which may be necessary or convenient in the transaction of my business or the enforcement of my rights in my said business.

⁵ Written authority to commence or defend actions is not generally required. Wis. Stats. 1898 sec. 2585; Mo. R. S. 1879 sec. 3564. But the court may, upon motion, require proof of authority and stay proceedings meantime. Iowa Code sec. 320; Minn. Rev.

Laws 1905 sec. 2284; N. Dak. Rev. Codes sec. 430; S. Dak. Rev. P. C. sec. 700. In New York a defendant may require the plaintiff's attorney to produce proof of his authority to commence any action for the recovery of real property. N. Y. Code secs. 1512-1514.

[*General authority to defend*]: to appear in my behalf and defend all actions which may be brought against me in any of the courts of the state of

[*If suit has been commenced*]: hereby recognize and ratify the authority of C.... D..., attorney at law, to bring [*or to defend*] that certain action now pending in the court [*describing the action*].

A.... B....

[*Date.*]

39. Claim against estate of deceased person.*

[*Title of court.*]

In the matter of the claim of A.... B.... against The Estate of C.... D...., Deceased.	}
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[*Venue.*]

A.... B.... being duly sworn says that the said C.... D.... was in his lifetime, and the estate of the said C.... D...., deceased, is now indebted to this deponent [*or to the firm of A.... B.... and E.... F.... of which this deponent is one*] upon a certain promissory note in writing, a copy of which note, with all endorsements thereon is hereto attached [*or upon an open account for goods sold and delivered, a copy of which account duly itemized is hereto attached*] in the sum of dollars with interest thereon at six per cent from 19..; that the said claim is just and true, and the amount thereof is justly due; that no payments have been made thereon which are not credited, and that there are no off-sets to the same to the knowledge of affiant.

A.... B....

[*Jurat.*]

[*Serve upon executor or administrator, or file with the proper court as required by the statutes of the particular state.*]

* New York Code sec. 1822; Wis. Stats. 1898 secs. 3838 *et seq.*; Minn. Rev. Laws 1905 sec. 3730; Iowa Code sec. 3338; Cobbey's Ann. Stats. of Nebr. sec. 5079 *et seq.*; S. Dak. Rev. Pro. C. sec. 171. In North Dakota the claim must be entitled in the name of the claimant against the executor or administrator. N. Dak. Rev.

Codes secs. 6403-6406. In Missouri some variation from this form will be necessary; the claimant must state "to the best of his knowledge and belief that he has given credit to the estate for all payments and off-sets to which it is entitled and that the balance claimed is justly due." R. S. Mo. 1889 sec. 194. In Iowa

40. The same, by agent or attorney.⁷

[Title of court.]

In the matter of the claim of	}
A.... B....	
against	
The Estate of C.... D....	
Deceased.	

[Venue.]

E.... F.... being duly sworn says he is the agent [or attorney] of the above named claimant and makes this affidavit in his behalf; that the reason this affidavit is not made by the said A.... B.... is that the said claimant is a non-resident of this state and is not now within this state, and that all the facts with reference to this claim are within the personal knowledge of this affiant [or state other facts showing why the claimant does not make the affidavit himself]; that the said C.... D.... was in his lifetime and the estate of the said C.... D.... is now indebted to the said A.... B.... [proceed as in Form 39 to the end].

A.... B....

[Jurat.]

41. Contingent claim against estate.⁸

[Title of court.]

[Title of claim.]

[Venue.]

A.... B.... being duly sworn says that he is the owner of a certain contingent claim against the estate of the said C.... D...., deceased, the particulars of which claims are as follows: that upon the day of, 19.., the said C.... D...., then in life guaranteed in writing the payment of a certain promissory note [a copy of which note is attached hereto,] made by one E.... F.... and delivered to affiant, which note will become due upon the day of, 19.., whereby said de-

the claim must be entitled in the name of the claimant against the executor or administrator as such, naming the estate. Iowa Code sec. 3339.

⁷In South Dakota when the affidavit is made by a person other than the claimant he must set forth in the affidavit the reason why it is not made by the claim-

ant. S. Dak. Rev. Pro. C. sec. 171.

⁸Contingent claims must be presented. Wis. Stats. 1898 sec. 3858; Minn. Rev. Laws 1905 sec. 3730; Iowa Code sec. 3343; N. Dak. Rev. Codes sec. 6403; S. Dak. Rev. Pro. C. sec. 170; Cob-bey's Ann. Stats. of Nebr. sec. 5091.

ceased became contingently liable to pay to deponent the amount of said note when due, with interest, unless the same be paid by the maker thereof. That the affiant is still the owner and holder of said note, and that there are no offsets thereto. Wherefore the affiant prays that his said claim be duly allowed as a contingent liability against the estate of said deceased. [*Or state concisely the particulars of the claim.*]

A.... B....

[*Jurat.*]

42. Claim for personal injuries, against municipal corporation.⁹

To [*insert corporate name of the municipal corporation or name of the officer or officers to whom the particular statute requires notice to be given*].

You are hereby notified that on the day of, 19..., at about o'clock .. M., while traveling with due care on foot [*or in a carriage drawn by a team of horses*] upon a certain highway [*or upon a certain public sidewalk on the north side of a certain highway in said town,—city or village—known as Washington Street,—or known as the Racine and Burlington road, or running east and west along the north line of section sixteen in said town, or otherwise describe the street or highway so as to clearly identify it*] at a point in said highway [*or upon said sidewalk*] about twenty rods east of the section line between sections fifteen and sixteen, *or in front of the residence of one John Smith, or one hundred feet west of the intersection of said highway with First Street, or at about the middle of a certain bridge or culvert over Duck Creek* [*or otherwise fix with reasonable certainty the place of the accident*] the undersigned [*or if notice is given by agent or attorney, one John Doe*] was violently thrown to the ground and his leg broken and severe internal injuries

⁹ A notice of this nature in case of a claim for personal injury against a town, village or city is now required in many states. The terms of the various statutes are somewhat different, and the time within which it must be served as well as the official upon whom it must be served vary considerably, so that the particular statute should be carefully studied in preparing the notice. Generally it is required that the time, place, and circumstances of the accident and the character of the defect

claimed be stated, and all of these essential details should be carefully and fully set forth. This notice is almost universally a condition precedent to any liability, and too much care to make it complete and perfect cannot be taken. It must be alleged in the complaint and proven on the trial if denied. *Dorsey v. Racine*, 60 Wis. 292 s.c. 1 N. W. 928. It must state the place where the injury occurred with reasonable certainty. *Weber v. Greenfield*, 74 Wis. 234 s.c. 42 N. W. 101.

sustained [*or otherwise describe the injuries received*] and his carriage wrecked [*or his horses killed*] by reason of the insufficiency and want of repair of said street [*sidewalk or bridge*] consisting of a deep excavation in said street [*or adjacent to said sidewalk*] into which he fell [*or his carriage was thrown*] on account of the absence of any guard or railing to protect travelers from falling therein [*or otherwise fully describe the defect and the manner in which the accident occurred*].

And you are further notified that satisfaction for such injuries and damage is claimed from said city [*town or village*] [to the amount of dollars].¹⁰

A.... B....
[*or* A.... B....
by C.... D....
his attorney].

[*Date.*]

[*Verification if required by local statute.*]

43. Another form, sidewalk injury.¹¹

To [*name city, town, or proper official to whom notice is given.*]

Take notice that on the day of, 19.. at about o'clock .. M. I received a severe bodily injury by reason of a defect in a certain sidewalk on the north side of Washington Street in the city of at a point about two hundred feet west of the intersection of said street with First Street in said city. That the defect or insufficiency which occasioned said injury consisted of a hole in said sidewalk at said point about a foot in length and six inches deep, and of a sufficient width to receive the foot, into which while traveling on said sidewalk my foot accidentally slipped and was caught, throwing me to the ground with violence, dislocating my right ankle and causing other severe injuries. Take notice also that I claim satisfaction from said city [*or town*] for such injuries in the sum of dollars.

A.... B....

[*Date.*]

[*Verification if required.*]

¹⁰ In Minnesota the amount of the damage claimed must be stated. Minn. Rev. Laws 1905 sec. 768. In North Dakota it must be *signed by the claimant and verified*, and the amount of the claim should be stated. N. Dak. Rev. Codes secs. 2172, 2173.

¹¹ This notice is intended to be

signed by the party injured. In some states this is necessary by statute, as is also a verification, while in others an unverified notice is sufficient and it may be given by the agent or attorney. In all cases close attention to the statute is necessary.

44. Notice of claim against city.¹²

To A.... B...., city clerk of the city of [*or other officer designated by the statute*].

I, C.... D...., of, hereby make claim against the said city of in the sum of dollars for personal injuries received by me under the following circumstances: On the day of, 19.., while I was traveling on foot on the sidewalk on the north side of State Street in said city, I slipped and fell upon a large mound of ice which had been negligently allowed to accumulate and remain upon said sidewalk at a point one hundred feet west of the intersection of said State Street with First Street, thereby breaking my right leg and suffering other severe and permanent bodily injuries, and was put to great expense for medical attendance, nursing, and other expenses, for all of which injuries and expenses I claim the said sum of dollars damages.

C.... D....

[*Date.*]

[*Verification is required.*]

45. Statement of claim for personal injury to be laid before town board of audit (Wis. Stats. 1898 sec. 824; Laws 1899 c. 14).

To the Town of, its Supervisors and Board of Audit.

I, the undersigned claimant, of, have and hereby present a claim against said town for the sum of dollars, which claim arises on account of a personal injury received by me under the following circumstances:

[*Here set forth facts of the injury, specifying time and place and injuries received with particularity, substantially as in the notice of injury.*]

That by reason of said injuries I was a long time sick, sore, lame and disabled [and have been permanently crippled].

The items of my claim are:—

Damages resulting from personal injury.....\$
Expenses for medical care, nursing and medicines

¹² Many city charters forbid actions against the city and require the claim to be filed with the clerk or comptroller, and provide for an appeal from the action of the council as the only means of getting the claim into court. The

above form will generally be found sufficient in such cases, but the statute should be carefully studied and followed. This claim is frequently necessary in addition to the notice covered by Forms 42 and 43.

Loss resulting from being confined and kept from
attending to my business.....

Amount.....\$

which I claim from said town.

Due written notice of said injury and damage, the place where it occurred, and describing generally the insufficiency and want of repair of said highway which occasioned it, and that satisfaction therefor was claimed by me of said town, was on the day of, 19.., served on X.... Y...., one of the supervisors of said town, reference to which is hereby made.

Dated, 19..

A.... B...., Claimant.

46. Notice of claim against railroad company for stock killed
(Wis. Stats. 1898 sec. 1816b; Laws 1899 c. 307).¹⁸

To the Railroad Company.

Take notice that on the day of, 19.., while your servants and agents were operating an engine and train of cars upon your railroad at a point thereon about forty rods west of the point where said railroad crosses that certain highway in the town of, county of, and state of Wisconsin, known as the Bloomington road [*or otherwise describe the place of accident with certainty*], the said agents and servants negligently ran said engine and train upon and killed [*or injured*] one certain roan mare belonging to A.... B.... of said town, and further that satisfaction therefor is hereby claimed from you.

Dated, 19..

A.... B...., Owner.

[*or* C.... D....

Attorney, *or* Agent, of
said A.... B....]

[*To be served as a summons is served upon a railroad corporation. See Wis. Stats. 1898 sec. 2637.*]

47. Claim for stock killed, another form, defective fencing
(Wisconsin).

To the Railroad Company.

Take notice that on the day of, 19.., at the town of, county of, Wisconsin, on the railroad track

¹⁸ The giving of this notice is a prerequisite to the right to maintain the action, and it should be alleged in the complaint. Wis.

running through the quarter of the quarter of section in said town [range], your locomotive and cars there passing ran over and killed the following stock owned by me [or owned by A.... B....]; [*here describe the same particularly*], all of the value of dollars, said stock having escaped upon said track through fences negligently suffered by you to remain defective and insufficient.

Dated, 19..

A.... B...., Owner.
[or C.... D.... Attorney
or Agent of said A.... B....]

48. The same, for fire set by locomotive (Wis. Stats. 1898 sec. 1816b; Laws 1899 c. 307).

To the Railroad Company.

Take notice that on the day of, 19.., fire was negligently allowed to escape by your agents and servants from a defective engine then being operated by your agents and servants at that point upon your railroad where the same crosses the farm of A.... B.... in section sixteen in the town of, county of, and state of Wisconsin [*or otherwise describe the place with certainty*], and that such fire was negligently allowed to spread upon and into the field of the said A.... B...., immediately adjoining your said railroad in said section and destroyed two certain stacks of hay, the property of said claimant; and further that satisfaction for such hay, so destroyed, is hereby claimed from you.

Dated, 19..

A.... B...., Owner.
[or C.... D...., Attorney
or Agent of said A.... B....]

[*To be served as a summons is served.*]

49. The same, another form (Wisconsin).

To the Railroad Company.

Take notice that on the day of, 19, at the town of, in the county of, Wisconsin, a fire was negligently set from one of your locomotives on lands owned by me, to-wit: [*here describe the lands*] over [*or along*] which your railroad runs; that the fire so set then and there destroyed certain property owned by me as follows: [*here specify the nature of the injury and the property destroyed*]; that said damage having

Stats. 1898 sec. 1816b. But if the the notice is not required. Laws
action be brought within one year 1899 c. 307.

been caused by the negligence of you, the said company, satisfaction therefor is claimed of you.

Dated, 19..

A.... B...., Owner.

50. Notice and affidavit of killing stock by railroad company. (Iowa and Nebraska).¹⁴

To the Railroad Company.

Take notice that on the day of, 19.., while an engine [and train of cars] was being operated by your employees upon your railroad in the town of, county of, state of Iowa, at a point on said railroad where you had a right [*in Nebraska say, where you were required*] to fence the same but had not done so, to-wit [*locate point with certainty*], said engine [*or engine and train*] was run upon a roan mare belonging to the undersigned, then running at large, of the value of dollars, whereby said mare was killed [*or injured*], and you are requested to pay said sum within thirty days from the service of this notice on you.

Dated, 19..

A.... B....

[*Venue.*]

A.... B.... being duly sworn deposes and says that on the day of, 19.., he was the owner of a certain roan mare of the value of dollars, and that on said day the same was killed [*or injured*] on the line of the railroad, in the town of, county of, state of, by an engine [and train of cars] being then and there run upon and over said mare by the employees of said railroad company while she was running at large at a point where said railroad company had the right to fence their road but had not done so.

A.... B....

Subscribed and sworn to before me and in my presence by the said A.... B.... this day of, 19..

C.... D....

[SEAL]

Notary Public County.

¹⁴In Iowa this notice is necessary only to entitle the plaintiff to recover double damages. It is to be served upon any officer or station or ticket agent employed by the corporation in the county where the injury occurred, by delivery of the original affidavit and notice. See notes to Iowa Code sec. 2055. In Nebraska this notice

is a prerequisite to the recovery of double damages. It is to be served in the same manner as in Iowa, and if the railroad company do not object to the value stated in the notice within ten days it shall be taken and considered as the true value. Cobbey's Ann. Stats. of Nebr. sec. 10021.

50a. Notice of personal injuries (Wis. Stats. 1898 sec. 4222 subd. 5; Laws 1899 c. 307).

To C.... D....

Take notice that on the day of, 19.., at [*state place of injury with particularity*], the undersigned [*or A.... B....*] received the following personal injuries [*state them in detail*]; that said injuries were received [*state manner in which they were received*] and that I [*or said A.... B....*] claim(s) satisfaction for said injuries from you on the following grounds [*state grounds on which defendant's liability is claimed. If it be on the ground of negligence state the particulars in which defendant was negligent; see Chapter LIX, infra, on complaints in actions for negligence. It was held in Drinkwater v. Andrew, 126 Wis. 241 s.c. 105 N. W. 575, that the above named section, requiring the giving of notice of personal injuries within one year after the happening of the event, is not applicable to an injury inflicted by assault and battery*].

Dated, 19..

A.... B.... [*or G.... H....*,
Attorney for A.... B....]

51. Notice of application for appraisal of stock killed or injured by railroad company (South Dakota).¹⁵

To the Railroad Company, and to C.... D...., a station agent of said company.

You are hereby notified that on the day of, 19.., at o'clock .. M. of that day I shall apply to L.... M...., Esq., a justice of the peace in and for said county of, at his office in the of, in said county, for the appointment of three appraisers to affix a value upon that certain roan mare which was the property of the undersigned, and which was killed [*or crippled*] by being run over by an engine and train of cars operated by the employees of said railroad company on the day of, 19.., at [*describe the place of the accident*].

Dated, 19..

A.... B....

¹⁵ This notice may be served on a station agent of any railroad company killing or injuring stock, and thereupon an appraisal of damage may be had before action which is conclusive.

S. Dak. Rev. Code C. P. sec. 749. Forms 52, 53 and 54 are believed to be sufficient to meet the statutory requirements as to the proceedings on such appraisalment.

52. Appointment of appraisers to assess damages for live stock killed or crippled (South Dakota).¹

[Venue.]

In the matter of the application
of A.... B.... for the ap-
pointment of appraisers to affix
value of certain stock alleged
to have been killed [*or* crippled]
by the Railroad
Company.

Application having been duly made to me, after notice duly given, by A.... B.... for the appointment of appraisers to affix the value to certain live stock, the property of said A.... B...., alleged to have been killed [*or* crippled] by the Railroad Company, on the day of, 19.., in the town of, in said county of

NOW THEREFORE I do hereby appoint F.... E...., G.... H...., and I.... K...., three discreet and disinterested citizens of said county of, a board of appraisers, who shall examine the horses [cattle *or* stock] so killed [*or* crippled] and affix a value upon the same [*if* killed] [*or* assess the damages to the same, *if* crippled] and make due return of their proceedings to me as required by law with all convenient speed.

Dated, 19..

C.... D....
Justice of the Peace.
..... County.

53. Oath of appraisers of live stock killed or crippled (South Dakota).

[Venue.]

E.... F...., G.... H.... and I.... K...., being each duly sworn, each for himself says that he will well and truly examine all horses [cattle *or* stock] exhibited to him by A.... B.... and alleged to have been killed [*or* crippled] by the Railroad Company, and will justly and truly affix a value to the same if killed and assess the damages to the same if crippled, and will make written report to C.... D...., Esq., Justice of the Peace, describing the said horses, cattle or stock, and stating whether they were killed or crippled, and setting out the valuation or

assessment of damage made by them and each of them; and further deponents say not.

E.... F....

G.... H....

I.... K....

Subscribed and sworn to before me this day of, 19..

C.... D....

Justice of the Peace.

54. Report of appraisers of live stock killed or crippled (South Dakota).

[*Venue.*]

To C.... D...., Esq., Justice of the Peace.

The undersigned, who were appointed by you on the day of, 19.., appraisers to examine the horses [cattle *or* stock] of A.... B...., alleged to have been killed [*or* crippled] by the Railroad Company, and affix a value upon the same [*if killed*] [*or* to assess the damages to the same *if crippled*] do hereby make the following report: We certify that we have duly examined the said stock and find the following stock was killed, viz:

One roan mare, 6 years of age, which we value at \$100.

One grey gelding, 5 years of age, which we value at \$90.

and we further certify that the following stock was crippled, viz:

One black yearling colt damaged in the sum of \$25.

Respectfully submitted,

E....	F....	} Appraisers.
G....	H....	
I....	K....	

[*Attach report and oath together and file with justice.*]

CHAPTER III.

ARBITRATION AND SUBMISSION WITHOUT ACTION.

- | | |
|---|---|
| 55. Common law agreement of arbitration, submitting all demands. | 65. Award of arbitrators. |
| 56. Statutory agreement of arbitration, submitting all demands. | 66. Notice of motion to confirm award. |
| 57. Statutory agreement of arbitration, submitting a single demand. | 67. Notice of motion to vacate. |
| 58. Minnesota statutory form of arbitration. | 68. Notice of motion to modify award. |
| 59. Arbitration agreement, providing for appointment of a third arbitrator. | 69. Order confirming award. |
| 60. The same, providing for the appointment of an umpire. | 70. Order vacating award. |
| 61. Stipulation of parties extending the time. | 71. Order modifying award and directing judgment as modified. |
| 62. Oath of arbitrators. | 72. Judgment upon award. |
| 63. Notice of first meeting of arbitrators. | 73. Submission of controversy without action (New York). |
| 64. Revocation of arbitration agreement. | 74. Judgment upon submission (New York). |
| | 75. Submission of controversy without action. |
| | 76. Finding of court upon submission. |
| | 77. Judgment on the foregoing finding. |

55. Common law agreement of arbitration, submitting all demands.¹

WHEREAS certain controversies now exist between the undersigned A.... B...., of, and C.... D...., of,

NOW THEREFORE it is hereby agreed that the said controversies and all of them be and they hereby are submitted to E.... F...., of, and G.... H.... as arbitrators; the said arbitrators to hear and determine the same and make their award in writing on or before the day of, 19..

Witness our hands this day of, 19..

A.... B....

C.... D....

In Presence of:

J.... K....

¹ At common law the agreement of arbitration may be made by parol; prudence requires, however, that it should be in writing. No judgment can be entered upon

the award under such an agreement, and if enforced it must be enforced by action brought upon the award.

56. Statutory agreement of arbitration, submitting all demands.²

THIS AGREEMENT, made this day of, 19.., between A.... B...., of, and C.... D...., of

WITNESSETH that whereas certain controversies now exist between the said A.... B.... and C.... D...., in order that the same may be finally settled and determined, we, the said A.... B.... and C.... D.... do hereby agree that all differences and controversies now existing between us, of every kind and nature, which might be the subject of a civil action, be and the same are hereby submitted to the award and determination of E.... F.... as arbitrator [*or* E.... F.... and G.... H.... as arbitrators], who shall have full power and authority to hear and determine the said controversies, claims and demands, and shall make their award thereon in writing * on or before the day of, 19..; and it is further agreed that judgment may and shall be rendered upon the award so made by the court of county, state of

^b It is further agreed that said arbitrator shall receive [*or* arbitrators shall each receive] the sum of dollars per day for his fees and expenses in the matter of this arbitration, the same to be taxed and allowed by the court as part of the costs of said arbitration.

A.... B....
C.... D....

[*Add acknowledgment, as in Form 14 et seq.*]

57. Statutory agreement of arbitration, submitting a single demand.³

THIS AGREEMENT made this day of, 19.., between A.... B...., of, and C.... D....

WITNESSETH, that whereas a certain controversy has arisen and now exists between the said A.... B.... and C.... D.... concerning a demand by the said A.... B.... against the said

²In Wisconsin the statutory agreement of arbitration is required to be witnessed by one or more witnesses and no acknowledgment is necessary; but in the states of New York, Minnesota, Iowa, Nebraska, and North Dakota the agreement must be acknowledged like a conveyance of real estate, and in Nebraska and Minnesota such acknowledgment must be taken before a justice of the

peace. N. Y. Code sec. 2365; Wis. Stats. 1898 secs. 3544, 3545; Minn. Rev. Laws 1905 sec. 4380; Iowa Code sec. 4385; Cobbey's Ann. Stats. of Nebr. secs. 1809, 1810; N. Dak. Rev. Codes secs. 5980, 5981.

³If a particular controversy only is to be submitted for arbitration it must be clearly and definitely described in the agreement.

C.... D.... for the sum of dollars, for services alleged to have been rendered by the said A.... B.... for the said C.... D.... as architect in drawing plans and specifications of a certain dwelling-house, which demand the said C.... D.... disputes and refuses to pay;

NOW, in order that the said controversy may be finally settled and determined it is hereby mutually agreed that the same be and is hereby submitted to the award and arbitration of E.... F.... as arbitrator [*or E.... F.... and G.... H.... as arbitrators*], who shall have full power and authority to hear and determine the said controversy and shall make their award thereon in writing [*proceed as in preceding Form 56 from the **].

58. Minnesota statutory form of arbitration (Minn. Rev. Laws 1905 sec. 4381).⁴

KNOW ALL MEN, that A.... B...., of, and C.... D...., of, have agreed to submit the demand described in the statement hereunto annexed [*or all demands existing between them, as the case may be*] to the determination of [*here insert the names of the arbitrators*] the award of whom [*or a majority of whom*] being made and reported within days from this date, to the district court for the county of, the judgment thereon shall be final.

Dated this day of, 19..

A.... B....
C.... D....

59. Arbitration agreement, providing for appointment of a third arbitrator.⁵

THIS AGREEMENT, made this day of, 19.., between A.... B...., of, and C.... D...., of

WITNESSETH that whereas certain differences and controversies now exist between the said A.... B.... and C.... D...., in order that the same may be finally settled and determined, we, the said A.... B.... and C.... D...., do hereby agree that all differences and controversies now existing between us of every kind and nature which might be the subject of a civil action be and the same are hereby submitted * to the award and determination of E.... F.... and G.... H.... and of such

⁴ This form is prescribed by the statutes of Minnesota, and should be exactly followed in that state. None of the other states covered by this work prescribe a form for the agreement.

⁵ By N. Y. Code sec. 2367 it is provided that an additional arbitrator or umpire cannot be selected unless the submission expressly so provides, and such selection must be in writing.

third person as the said E.... F.... and G.... H.... shall by writing, under their hands and to be endorsed upon this agreement, appoint to act with them, as arbitrators, who shall have full power and authority to hear and determine the said controversies, claims and demands, and shall make their award thereon in writing [*proceed as in Form 56 from the **].

60. The same, providing for the appointment of an umpire.⁶

[*Begin as in Form 59 to the * and continue*]: to the award and determination of E.... F.... and G.... H.... as arbitrators, and in case they shall not agree, to the umpirage of J.... K.... [*or such person as the said arbitrators shall appoint*] which said arbitrators, or in case of their disagreement said umpire, shall have full power and authority to hear and determine the said controversies, claims and demands, and shall make an award thereon in writing [*proceed as in Form 56 from the **].

61. Stipulation of parties extending the time.

The within named A.... B.... and C.... D...., for ourselves and each of our heirs, executors and administrators, do hereby agree that the within named arbitrators shall have futher time for making their award of and concerning the matters referred to them in this agreement, until the day of, 19..

Witness our hands this day of, 19..

Witness: E.... F....

A.... B....
C.... D....

[*This stipulation should be endorsed upon the original agreement.*]

62. Oath of arbitrators.⁷

In the Matter of the Arbitration
of Differences between A....
B.... and C.... D....

[*Venue.*]

E.... F.... and G.... H...., the arbitrators appointed by the said A.... B.... and C.... D.... in the above-entitled

⁶ In New York, as stated in note five, an additional arbitrator or umpire may be provided for in the agreement, but it seems that under the statutes of Wisconsin, Minnesota, Iowa, Nebraska and North Dakota, hereinbefore referred to, all the arbitrators must be named in the agreement of

submission. Such is the express provision of Iowa and Nebraska. Iowa Code sec. 4386; Cobbey's Ann. Stats. of Nebr. sec. 1809; Minn. Rev. Laws 1905 sec. 4381; Holdridge v. Stowell, 39 Minn. 360 s.c. 40 N. W. 259.

⁷ This form is in accordance with the provisions of N. Y. Code

matter, being each duly sworn, each for himself says that he will faithfully hear and examine the matters in controversy submitted to him by the said A.... B.... and C.... D.... in their agreement of arbitration and will make a just award thereon according to the best of his understanding.

E.... F....

G.... H....

Subscribed and sworn to before me this day of, 19..

I.... K....

Notary Public,
..... County.

63. Notice of first meeting of arbitrators.

In the Matter of the Arbitration
of Differences between A....
B.... and C.... D....

We, the undersigned arbitrators appointed by the said A.... B.... and C.... D.... in their agreement in writing dated on the day of, 19.., do hereby appoint the day of, 19.., for proceeding to hear and decide the matters in difference between the said A.... B.... and C.... D.... at the hour of o'clock, in the city of, state of

To Messrs. A.... B....
and C.... D....

E.... F....
G.... H....
Arbitrators.

64. Revocation of arbitration agreement.^a

In the Matter of the Arbitration
between A.... B.... and
C.... D....

To E.... F.... and G.... H...., Arbitrators.

Please take notice that we hereby revoke your power as arbitra-

sec. 2369 and Wis. Stats. 1898 sec. 3547. In Minnesota, under Minn. Gen. Stats, 1894 sec. 6216, instead of the words "and make a just award thereon according to the best of his understanding," it was advisable to insert the words "and make a just award according to the law and evidence." The provisions of sec. 6216 of the statutes of 1894 requiring the arbitrators to be sworn seem, however, to

have been omitted from the revision of 1905. See Minn. Rev. Laws 1905 sec. 4382. In North Dakota the arbitrators must be sworn "to faithfully and fairly hear and examine the allegations and evidence of the parties in relation to the matters in controversy, and make a just award according to their understanding." N. Dak. Rev. Codes sec. 5983.

^a In New York the submission

tors under the submission made to you by us in writing dated the day of, 19..

Dated, 19..

A.... B....
C.... D....

65. Award of arbitrators.⁹

In the Matter of Arbitration of of certain Differences between A.... B.... and C.... D....	}	Award of Arbitrators.
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The undersigned arbitrators, who were duly appointed and agreed upon in the annexed agreement of arbitration to hear and determine all differences and controversies existing between A.... B.... and C.... D.... [*or if a certain particular controversy only was submitted state what it was in apt terms*] do hereby certify that on the day of, 19.., we took and subscribed the oath required by law of us as such arbitrators, which oath so taken is hereto attached, and that we gave to each of the parties to said submission days' notice in writing of our first meeting. We further certify that on the day of, 19.., at the hour of o'clock .. M., at the office of O.... P...., in the city of, in the state of, pursuant to such notice, we met and proceeded to hear the allegations and evidence of the parties, and that thereafter we duly adjourned from time to time until this day of, 19.., and having heard all of the evidence, proofs and arguments, we do hereby find and adjudge that there is now due and owing from the said C.... D.... to the said A.... B.... the sum of dollars, which sum it is ordered that the said C.... D.... pay to the said A.... B.... within days from this day [*or otherwise state the conclusion of the arbitrators, which*

may be revoked by either party at any time before the allegations and proofs have been closed and the matter finally submitted to the arbitrators. N. Y. Code sec. 2383. In Wisconsin and North Dakota either party may revoke before the cause has been finally submitted to the arbitrators for decision. Wis. Stats. 1898 sec. 3565; N. Dak. Rev. Codes sec. 5999. In Minnesota neither party can revoke without the consent of the other. Minn. Rev. Laws 1905 sec. 4380. Such is the law in

Iowa (Iowa Code sec. 4390), and in Nebraska (Cobbey's Ann. Stats. of Nebr. sec. 1814).

⁹ In New York and North Dakota the award must be acknowledged and certified like a conveyance of real estate. N. Y. Code sec. 2372; N. Dak. Rev. Codes sec. 5985. In Wisconsin and Minnesota it must be attested by at least one subscribing witness. Wis. Stats. 1898 sec. 3550; Minn. Gen. Stats. 1894 sec. 6218 cf. note to Minn. Rev. Laws 1905 sec. 4382.

statement may be substantially in the forms hereinafter set forth in this work for judgments]. We further certify that we, as arbitrators, have each been occupied in the hearing of said controversy and in preparing our award days [and that annexed hereto is a true statement of the witnesses present and the witnesses who were examined before us upon said arbitration, and the number of days that they were severally present].

Dated on the day of, 19..

In Presence of:

I.... K....

E.... F....

G.... H....

Arbitrators.

[*Add acknowledgment and verification if required by statute.*]

66. Notice of motion to confirm award.

[*Title of court.*]

In the Matter of the Arbitration of Certain Controversies between A.... B.... and C.... D....	}
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To C.... D...., Esq.

Please take notice that upon the award of E.... F.... and G.... H...., arbitrators, appointed by us in a certain agreement dated the day of, 19.., which said award was filed in the office of the clerk of the court, on the day of, 19.., and upon the original agreement of arbitration attached to said award, as well as upon the evidence taken by said arbitrators and filed with said award [and upon the affidavit of W.... X.... and Y.... Z.... attached to this notice] the undersigned will move the said court of county, on the day of, 19.., at the opening of court on that day or as soon thereafter as counsel can be heard, for an order * confirming said award and directing judgment to be rendered in accordance with the terms thereof.

Dated, 19..

A.... B....

67. Notice of motion to vacate.¹⁰

[*Proceed as in Form 66 to the **]: vacating the said award for the reason that it appears upon the face thereof and from the papers upon which this motion is based that such award was procured by corruption, fraud and other means [*or state*

¹⁰ N. Y. Code sec. 2364; Wis. sec. 4397; Cobbeys Ann. Stats. Stats. 1898 sec. 3553; Minn. Rev. of Nebr. sec. 1820; N. Dak. Rev. Laws 1905 sec. 4384; Iowa Code Codes sec. 5987.

such other grounds for the vacation of the award as are shown to exist and which are sufficient under the particular statute to entitle the party to vacation of the award].

Dated this day of, 19..

A.... B....

68. Notice of motion to modify award.¹¹

[*Proceed as in Form 66 to the **]: modifying and correcting the said award in the following respects, to-wit: reducing the amount of said award from dollars to dollars [*or otherwise state specifically the particular modification which is desired in the award*] and directing judgment to be entered upon said award as so modified and corrected. Said motion is based upon the ground that the said arbitrators have made an evident miscalculation of figures in the said award [*or otherwise state the ground upon which the motion is based as may be provided by the particular statute*].

69. Order confirming award.

[*Title of court.*]

In the Matter of the Arbitration
of certain Controversies between
A.... B.... and C.... D....

The above entitled matter having been brought to hearing before the court on the day of, 19.., upon the motion of A.... B.... to confirm the award made by E.... F.... and G.... H...., the arbitrators in the above entitled matter, which motion was based upon the said award and the agreement of arbitration and all papers filed with said award [as well as upon the affidavits of L.... M.... and N.... O....]; after hearing C.... D.... in opposition to said motion [as well as the affidavits of P.... Q.... and R.... S.... filed in opposition thereto], the court being now fully advised with regard to said matter;

IT IS ORDERED that the said award be and the same is hereby in all respects confirmed, and that judgment be entered in favor of the said A.... B.... adjudging that [*here state the particular judgment to be rendered*].

Dated this day of, 19..

By the Court:

I.... K....

Judge.

¹¹ N. Y. Code sec. 2375; Wis. Laws 1905 sec. 4385; N. Dak. Stats. 1898 sec. 3553; Minn. Rev. Rev. Codes sec. 5988.

70. Order vacating award.

[*Title as in Form 69.*]

The above entitled matter having been brought to hearing before the court on the day of, 19.., upon the motion of C.... D.... to vacate the award of E.... F.... and G.... H...., the arbitrators in the above entitled matter, which motion was based upon the said award and the agreement of arbitration and all papers filed with said award [as well as upon the affidavits of L.... M.... and N.... O....]; after hearing A.... B.... in opposition to said motion [as well as the affidavits of P.... Q.... and R.... S.... filed in opposition thereto] the court being now fully advised with regard to said matter;

IT IS ORDERED that the said award be and the same is hereby in all respects vacated and set aside. [*If a rehearing by the arbitrators is ordered: "and that a rehearing of said controversy be had by the said arbitrators with all convenient speed."*]

Dated this day of, 19.. By the Court:

I.... K....
Judge.

71. Order modifying award and directing judgment as modified.

[*Title as in Form 69.*]

The above entitled matter having been brought to hearing before the court on the day of, 19.., upon the motion of A.... B.... to modify and correct the award of E.... F.... and G.... H...., the arbitrators in the above entitled matter, which motion was based upon the said award and the agreement of arbitration and all papers filed with said award [as well as upon the affidavit of L.... M.... and N.... O....]; after hearing C.... D.... in opposition to said motion [as well as the affidavits of P.... Q.... and R.... S.... filed in opposition thereto] the court being now fully advised with regard to said matter;

IT IS ORDERED that the said award be and the same is hereby modified and corrected as follows [*here state particularly the respects in which the award is modified and corrected*]; and it is further ordered that judgment be rendered upon the said award as herein modified and corrected.

Dated this day of, 19..

By the Court:

I.... K....
Judge.

72. Judgment upon award.

[Title as in Form 69.]

AT A TERM of the court of the county of, held on the day of, 19.., and on the day of, 19.., being a day of said term, the above entitled matter having come on to be heard and the court having upon due notice and hearing confirmed [*or* modified and corrected] the award of E.... F.... and G.... H...., the arbitrators in said matter, and having ordered judgment to be rendered upon the said award so confirmed [*or*, so modified and corrected];

IT IS HEREBY ADJUDGED and determined [*set forth the judgment rendered in accordance with the order, stating the relief granted as in ordinary judgments.*]

Dated this day of, 19.. By the Court:

I.... K....
Clerk.

73. Submission of controversy without action (N. Y. Code sec. 1279 et seq.).

[Title of court.]

A.... B....,	}	Plaintiff,
vs.		
C.... D....,		
		Defendant.

There being a controversy between the above named parties, it is hereby agreed by the said parties that the same be submitted to the court for the determination of said controversy; and it is further agreed that the following is a statement of the facts upon which said controversy depends [*state all the facts as in a pleading.*]

It is further agreed that this submission shall be filed with the county clerk of county, and that the facts herein stated are admitted by the parties for the purpose of this submission only and are not to be construed as admissions binding either party save for the purposes of this proceeding.

Upon said facts the plaintiff demands judgment that [*state relief desired by the plaintiff*], and the defendant demands judgment that [*state relief desired by the defendant.*]

[Date.]

A.... B....
C.... D....

[Add acknowledgment or proof and certificate in like manner as in a deed.]

[Venue]

A.... B.... and C.... D...., being each duly sworn, each for himself says that the controversy named in the foregoing statement of facts and submission is a real controversy and that the said submission is made in good faith for the purpose of determining the rights of the parties.

A.... B....

C.... D....

[Jurat.]

74. Judgment upon submission (N. Y. Code sec. 1281).

[Caption as in Form 7.]

The parties above named having agreed upon a case and the same having been duly verified and submitted to this court, after hearing M.... N...., Esq., for the said A.... B...., and O.... P...., Esq., for the said C.... D...., the court being now fully advised; on motion of M.... N...., Esq., attorney for said A.... B.... [or O.... P...., Esq., attorney for the said C.... D....];

IT IS HEREBY ADJUDGED that [*here state the relief granted, using the proper form as in other judgments.*]

75. Submission of controversy without action.¹²

To the Court for County, State of

The undersigned, A.... B...., of, and C.... D...., of, in said state, being parties to a controversy which might be the subject of a civil action, hereby agree that the following is a true statement of the facts concerning such controversy, and we hereby submit the same to this court for its judgment and determination herein as provided by statute [*here state the facts in full.*]

Upon said facts the plaintiff prays judgment [*state the judgment desired by the plaintiff*], and the defendant prays judgment [*state the judgment desired by the defendant.*]

Dated this day of, 19..

A.... B....

C.... D....

[Venue]

A.... B.... and C.... D...., being each duly sworn, each for himself says that the facts stated in the foregoing submis-

¹² Wis. Stats. 1898 sec. 2788; Ann. Stats. of Nebr. sec. 1572; Minn. Rev. Laws 1905 sec. 4286; N. Dak. Rev. Codes sec. 6133; S. Iowa Code sec. 478; Cobbeys Dak. Rev. Code C. P. sec. 787.

sion are true and that the said controversy is real and these proceedings are had in good faith to determine the rights of the parties.

A.... B....
C.... D....

[*Jurat.*]

76. Finding of court upon submission.¹³

[*Title of court.*]

A.... B....,	}
Plaintiff,	
vs.	
C.... D....,	
Defendant.	}

The parties above named having duly submitted to this court a statement of certain facts duly agreed upon with reference to a certain controversy existing between them, and having prayed the determination of this court thereon, and the said matter having been duly heard at a regular term of this court, E.... F...., Esq., appearing for the said plaintiff, and G.... H...., Esq., appearing for the said defendant; the court now finds upon the facts so submitted, as conclusions of law [*here state the conclusions of the court, following the proper form of a finding in a case tried before the court.*]

Let judgment be entered accordingly.

Dated this day of, 19..

By the Court:
I.... K....
Judge.

77. Judgment on the foregoing finding.

[*Title of court and of cause.*]

The above entitled matter having been submitted to the determination of the court by the above named parties upon the agreed statement of facts on file, and the said parties having also filed their affidavit by which it appears that the said controversy is real and the proceeding brought in good faith to determine the rights of the parties, and the court having here-

¹³ This and the following form will be found sufficient in the states of Wisconsin, Minnesota, Iowa, Nebraska, South Dakota and North Dakota.

tofore made and filed its finding and determination herein and ordered judgment upon such finding.

NOW, upon motion of E.... F...., Esq., attorney for said A.... B....,

IT IS ADJUDGED [*here insert the proper judgment as ordered in the finding.*]

Dated this day of, 19..

By the Court:

I.... K....

Clerk.

CHAPTER IV.

LEAVE TO SUE.

- | | |
|--|---|
| <p>78. Affidavit for leave to sue on judgment in the same court.</p> <p>79. Notice of motion on foregoing affidavit.</p> <p>80. Order granting leave to sue.</p> <p>81. Petition for leave to sue on judgment recovered in another state.</p> <p>82. Petition for leave to sue a receiver.</p> <p>83. Notice of motion on foregoing petition.</p> <p>84. Order granting leave to sue a receiver.</p> <p>85. Petition of receiver for leave to sue.</p> <p>86. Order granting leave to receiver to sue.</p> | <p>87. Petition for permission to bring action upon the bond of an executor, administrator, or testamentary trustee (Wisconsin).</p> <p>88. Order granting leave on foregoing petition.</p> <p>89. Petition for leave to sue on a sheriff's bond.</p> <p>90. Order on above petition granting leave to sue.</p> <p>91. Petition by attorney general or other public prosecutor to bring action to vacate a corporate charter.</p> <p>92. Request to attorney general or prosecuting officer to sue.</p> |
|--|---|

78. Affidavit for leave to sue on judgment in the same court.¹

[*Title of court and of cause.*]

[*Venue*]

A.... B...., the above named plaintiff, being duly sworn, says that on the day of, 19.., he recovered judgment in the above entitled action against the above named defendant for the sum of dollars damages and costs, which said judgment was duly docketed in the office of the clerk of this court on the said day of 19.. [and in the counties of and on the day of 19..], and still remains unsatisfied [*or unsatisfied as to part of the same, to-wit, the sum of dollars*];

That execution has been duly issued upon said judgment and returned wholly unsatisfied [*or, unsatisfied as to the sum of dollars*], and that the defendant neglects and refuses to pay the amount due upon said judgment although of sufficient ability, as deponent is informed and believes, to pay the same.

¹ N. Y. Code sec. 1913; Wis. Codes sec. 5182; S. Dak. Code Stats. 1898 sec. 2916; N. Dak. C. P. sec. 37; Iowa Code sec. 3439.

[*Here state facts showing why it is necessary or proper to sue upon the judgment, as for example*]: That the said C.... D.... has real property in said county, as deponent is informed and believes, and that the lien of the said judgment thereon will expire by lapse of time on or about the day of, 19.., and that it is necessary to bring an action thereon in order to secure the collection of said judgment.

A.... B....

[*Jurat.*]

79. Notice of motion on foregoing affidavit.²

[*Title of court and cause.*]

To C.... D....,

the above named Defendant:

TAKE NOTICE that upon the affidavit of A.... B...., a copy of which is herewith served upon you, and upon the judgment roll in this action the plaintiff will move the above named court at a regular term thereof to be held in the court house in the city of, in said county, on the day of, 19.., at the opening of court on that day or as soon thereafter as counsel can be heard, for an order granting him leave to bring an action against you on such judgment and for such other relief as may be just.

Dated, 19..

A.... B....

80. Order granting leave to sue.

[*Caption of order as in Form 7.*]

The motion of the above named plaintiff for leave to commence an action upon the judgment heretofore rendered in this cause having come on to be heard upon the affidavit of A.... B.... and the judgment roll herein, L.... M...., Esq., appearing for the plaintiff and no one appearing in opposition [or O.... P...., Esq., appearing for the defendant in opposition to said motion];

IT IS ORDERED that the said plaintiff have leave to bring an action against the said defendant upon the said judgment.

Dated, 19..

By the Court:

I.... K....

Judge.

² Service of this notice should be made on the judgment debtor personally; in New York, however (N. Y. Code sec. 191 sub. 3), the court may direct notice to be

given in another manner if it appear that personal service on the judgment debtor cannot be given with due diligence. The facts showing the impossibility of

81. Petition for leave to sue on judgment recovered in another state (New York).³

To the Court:

THE PETITION of A.... B.... [*plaintiff*] respectfully shows that on the day of, 19.., judgment was rendered in his favor against one C.... D.... [*defendant*] for the sum of dollars, in an action brought by deponent against said C.... D.... in the court, which said judgment was duly docketed in the office of the clerk of the county of on the day of, 19.. [*continue as in Form 78 and add*];

That no previous application for leave to sue upon said judgment has been made [*if a previous application has been made state to what court or judge and what order or decision was made and what new facts are now shown*].

WHEREFORE your petitioner asks leave to bring an action upon said judgment in this court against said C.... D....

Dated, 19..

A.... B....

[*Verification as in Form 521.*]

82. Petition for leave to sue a receiver.⁴

[*Caption as in Form 3.*]

To the Court for County.

THE PETITION of A.... B.... respectfully shows to the court that on the day of, 19.., the said C.... D.... was, by an order of this court duly made, appointed receiver of the property and effects of E.... F...., in an action then pending in this court [*here state nature of the action*];

That said receiver has now in his possession, claiming title thereto as such receiver, certain property [*here describe the same with reasonable certainty*]; that your petitioner is in fact

personal service should appear in the affidavit, and an order to show cause should be made by the court specifying the manner of service to be made.

³ By the New York statute (N. Y. Code sec. 1913) the court in which the action is to be brought must make an order granting leave.

⁴ It rests in the discretion of the court to allow a party claiming rights against its receiver to

bring an independent action against him, or to compel such party to proceed against him by petition in the action in which he is receiver. *Bank v. Landauer*, 68 Wis. 44. In Minnesota a receiver or assignee may be sued in respect to any act or transaction of his in carrying on the business of his trust without previous leave of court. *Minn. Rev. Laws* 1905 sec. 4066.

the owner of such property, but that his title thereto is denied by the said receiver.

That your petitioner has demanded of said receiver that he deliver up the said property to your petitioner, but that said receiver refuses so to do.

That your petitioner has fully and fairly stated the case to L.... M...., Esq., his counsel, who resides at, and upon such statement he is advised by his said counsel and verily believes that he has a good and substantial cause of action against the said receiver to recover possession of said property.

WHEREFORE your petitioner prays that leave may be granted to him to bring an action in the court for county against said receiver to recover the said property [*or state in apt terms the relief desired in the action*] and for such other relief as to the court may seem just.

A.... B....

[*Verification as in case of a pleading.*]

83. Notice of motion on foregoing petition.

[*Title as in Form 82.*]

To C.... D...., Receiver:

TAKE NOTICE that upon the petition of A.... B...., a copy of which is herewith served upon you, the said A.... B.... will move the court, at a regular term thereof to be held in the court house in the city of, in said county, on the day of, 19.., at the opening of court on that day or as soon thereafter as counsel can be heard, for an order granting him leave to sue as demanded in said petition.

Dated, 19..

L.... M....

Attorney for Petitioner.

84. Order granting leave to sue a receiver.

[*Caption as in Form 7.*]

The petition of A.... B.... having come on to be heard before the court, and L.... M...., Esq., appearing for the said petitioner, no one appearing in opposition [*or N.... O...., Esq., appearing for the said receiver*], and the court being now fully advised in the premises;

IT IS ORDERED that leave be and is hereby given to the said A.... B.... to sue said receiver, as prayed in said petition.

[*Date.*]

By the Court,

I.... K....

Judge.

85. Petition of receiver for leave to sue.⁵

[*Title of court and action in which receiver was appointed.*]

To the Court for County.

THE PETITION of C.... D.... respectfully shows that on the day of, 19.., he was appointed receiver of the property and effects of A.... B.... by an order of this court bearing date on the said day [*or, by an order made by L.... M.... Esq., county judge, or, O.... P...., Esq., court commissioner.*]

[*State briefly and concisely the facts necessary to show the court that the receiver has a cause of action against the party whom he desires to sue.*]

That your petitioner has sufficient property in his hands as receiver to indemnify the said [*name party to be sued*] for any costs he may recover against your petitioner in such action. That no previous application for leave to bring this action has been made.

WHEREFORE your petitioner prays that he be granted leave by this court to bring an action against said [*name party to be sued*] to recover said debt [*or otherwise state the relief desired.*]

[*Date.*]

C.... D....

Receiver.

[*Venue*]

C.... D.... being first duly sworn, says that he has read the foregoing petition and knows the contents thereof, and that the same is true to his own knowledge.

C.... D....

[*Jurat.*]

86. Order granting leave to receiver to sue.

[*Caption as in Form 7.*]

On reading and filing the verified petition of the receiver in the above entitled action, praying leave to bring an action as such receiver against E.... F...., no one appearing to oppose said motion, it appearing to the court now here that reasonable grounds exist for such action; upon motion of said receiver [*or, L.... M.... Esq., counsel for said receiver*];

IT IS ORDERED that the said C.... D.... as such receiver, be and is hereby authorized to commence and prosecute an action

⁵ In the absence of statute or leave of court. Pomeroy's Eq. court rules receivers are not entitled to sue without obtaining Jur. sec. 1336.

in the proper court against the said E.... F.... [*here state any conditions which may be imposed by the court.*]

[Date.]

By the Court,

I ... K....

Judge.

87. Petition for permission to bring action upon the bond of an executor, administrator, or testamentary trustee (Wis. Stats. 1898 secs. 4015-4016).⁶

[Caption as in Form 3.]

To the Hon. I.... K...., Judge of said Court.

THE PETITION of A.... B...., of, respectfully shows to the court that he is a creditor [*or legatee, or next of kin of X.... Y...., deceased, whose estate is now in course of administration in said court; that O.... P...., the executor [or administrator] of said estate was by an order made by this court on the day of, 19.., ordered and directed to pay the debts and legacies of said deceased [or the distributive shares of said estate which the next of kin of said deceased are entitled by law to receive], and among said debts [or legacies, or distributive shares] the said executor [or administrator] was ordered and adjudged to pay to your petitioner the sum of dollars.*

That on the day of, 19.., your petitioner demanded of said executor [*or administrator*] payment of his said claim [*or legacy, or distributive share of such estate*] but said executor [*or administrator*] has refused and still refuses to pay the same or any part thereof, although he has moneys and effects of said estate in his hands sufficient to pay the same.

[*If it is claimed that petitioner has been injured by an act of maladministration, the facts showing the same should be set forth.*]

WHEREFORE your petitioner prays that he be permitted to bring an action upon the bond of the said executor or administrator against him and his sureties thereon.

A.... B....

Petitioner.

[Verification as in Form 85.]

[Attach the following certificate of attorney if thought advisable]:

⁶ In North Dakota leave of court must be obtained before bringing suit on an executor's bond. N. Dak. Rev. Codes sec. 4468. In Nebraska, before action

can be brought for maladministration on a probate bond, leave of court must be obtained. Cobbe's Ann. Stats. of Nebr. sec. 5163.

I, L.... M...., attorney for said petitioner, do hereby certify that I have examined the facts set forth in the foregoing petition and that in my opinion the petitioner has a valid and meritorious cause of action thereon.

L.... M....
Attorney.

88. Order granting leave on foregoing petition.

[Caption as in Form 7.]

Upon reading and filing the petition of A.... B.... praying for permission to bring action in his own behalf upon the bond of O.... P...., executor of the last will and testament [*or* administrator of the estate] of X.... Y...., deceased; it appearing from said petition that good ground exists for the commencement of such action;

IT IS ORDERED that permission be and is hereby given to bring an action on said bond against the said executor [*or* administrator] and the sureties upon such bond, in the name of the said petitioner as plaintiff, according to the prayer of said petition.

[Date.]

By the Court,
I.... K....
Judge.

89. Petition for leave to sue on a sheriff's bond (N. Y. Code sec. 1881; Minn. Rev. Laws 1905 sec. 4534).

[Caption as in Form 3.]

To the Supreme Court of the State of New York.

THE PETITION of A.... B...., of, respectfully shows to the court that at the times hereinafter named one C.... D.... was and still is the sheriff of the county of in this state, and prior to his entering upon the duties of his office he, the said sheriff, together with L.... M...., and N.... O...., his sureties, duly executed a joint and several bond to the people of this state [*or name the body politic named as obligee in the bond*] which bond was conditioned [*here state the condition of the bond*] and a certified copy of which bond is annexed to this petition.

[*Here allege the sheriff's default or breach of his bond in concise terms, as for instance*]:

That on the day of, 19.., the said C.... D.... as such sheriff received a writ of attachment theretofore duly issued in an action between X.... Y.... against one Z.... D.... to be executed against the property of said Z.... D.... and that the said sheriff by virtue of said writ of attachment

seized certain property of your petitioner's; that your petitioner claimed the return of the same from said sheriff, who thereupon summoned a jury to try such claim, and the jury upon an inquisition duly found that the same belonged to your petitioner; whereupon said attaching creditor duly indemnified the said sheriff for the detention of said property, whereby the said sheriff was required to and did detain the said property, to your petitioner's damage dollars, and that your petitioner has received no satisfaction of any kind for said injury.

[Or in case the breach of bond complained of consists of a neglect to pay over moneys]:

That on the day of, 19.., an execution was duly issued on behalf of your petitioner against the property *[or the person]* of one Z.... D.... upon a judgment for dollars theretofore duly recovered and docketed in favor of your petitioner against said Z.... D.... in the court, which execution was on the day of, 19.., delivered to and received by the said sheriff to be executed.

That as your petitioner is informed and believes, said sheriff collected and received upon said execution to the use of your petitioner, the sum of dollars, besides his fees and poundage, and that although more than sixty days have elapsed since the delivery of said execution and your petitioner did on the day of, 19.., demand of said sheriff that he pay over the said moneys, he the said sheriff has heretofore wholly failed to do so.

[If a judgment has been obtained against the sheriff allege it as follows]:

That your petitioner heretofore sued said sheriff for the said seizure of petitioner's property *[or for the said neglect to pay over said money]* and prior to the commencement of this action obtained judgment against the said sheriff for the sum of dollars, upon which judgment an execution has been issued and returned wholly unsatisfied, and that the said sheriff is, as your petitioner is informed and believes, wholly insolvent and unable to pay the said damages.

That no previous application for leave to sue on said bond has been made to the knowledge of your petitioner *[except, if any previous application has been made state the result.]*

WHEREFORE your petitioner asks leave to prosecute said bond of said sheriff in this court, and for such other order as may be just.

A.... B....

[Date.]

[Verification as in case of a pleading.]

[The application may be made ex parte, but in that case a counter motion may be made to vacate the order. N. Y. Code sec. 1892. It would seem better, therefore, to give notice of the application as in other motions for leave to bring actions.]

90. Order on above petition granting leave to sue.

[Caption as in Form 7.]

On reading and filing the verified petition of A.... B...., together with a certified copy of the official bond of C.... D.... as sheriff, and upon proof of due service of notice of this motion upon E.... F...., and after hearing O.... P...., of counsel for A.... B...., in support of said motion, no one appearing in opposition [*or*, Q.... R.... appearing in opposition to said motion]; now upon motion of said O.... P....,

IT IS ORDERED that said A.... B.... be permitted to bring and maintain an action on the official bond of said C.... D.... as sheriff, against the said C.... D...., and X.... Y.... and Z.... D...., sureties upon said bond, in this court, and that said action may be brought in the name of the said A.... B.... as plaintiff.

[Or where the action is to be brought in the name of the people]:

IT IS ORDERED that A.... B.... be authorized to bring an action against the said C.... D.... and X.... Y.... and Z.... D...., his sureties, in this court, in the name of the people of this state, stating in the process, pleadings and proceedings in such action that the same is brought on the relation of said A.... B....

By the Court:

I.... K....

Judge.

91. Petition by attorney general or other public prosecutor to bring action to vacate a corporate charter.⁷

[Caption as in Form 3.]

To the court of the State of

The attorney general of the state of [*or the prosecuting attorney of the county of, in the state of, or otherwise give the title of the officer who under the law of the particular state is authorized to commence the proceeding*], respectfully shows that the C.... D.... Company is a corporation which was created under and by virtue of the provisions

⁷ N. Y. Code sec. 1798 *et seq.*; Dak. Rev. Codes sec. 5777; S. Wis. Stats. 1898 sec. 3241; N. Dak. Rev. Code C. P. sec. 571.

of chapter of the laws of the state of [*here name the act of incorporation*] [*or was organized under and pursuant to the terms of chapter of the laws of the state of , naming the general act under which the corporation was organized, if any*] for the purpose of [*here state the purposes of the incorporation.*]

That the said corporation, as your petitioner is informed and believes, has not organized and commenced the transaction of its business although more than one year has elapsed since the time it became a corporation; on the contrary [*here state the facts specifically which substantiate the allegation, or, instead of this allegation set forth specifically any violation of law on the part of the corporation by which under the particular statute its corporate franchises have been forfeited.*]

That by reason of the said facts and circumstances hereinbefore set forth said corporation has forfeited its corporate rights and franchises.

WHEREFORE your petitioner asks leave to bring an action in the name of [the people of] the state for the purpose of vacating the charter of said corporation and annulling its existence.

Dated this day of, 19..

A...., B....

Attorney General.

[*Verification as in case of a pleading.*]

92. Request to attorney general or prosecuting officer to sue.*

To the Attorney General of
the State of

[*Or name the prosecuting officer as specified in the laws of the particular state.*]

You are hereby requested to bring an action against the C.... D.... Company of and its alleged directors, for the purpose of dissolving the said corporation and forfeiting its corporate rights, privileges and franchises [*or for the purpose of vacating the charter of said corporation and annulling its existence*] upon the following grounds: That the said corporation [*here state concisely the violations of law which have taken*

* N. Y. Code sec. 1786; Wis. Stats. 1898 sec. 3241; Iowa Code sec. 4316; N. Dak. Codes sec. 5777. In New York this application can only be made by a creditor or stockholder of the corporation, and generally in the other states it may be said that either

by statute or upon general local principles the application should show that a private person who desires to sue should have some interest in the subject matter of the action and such interest should be set forth in this application.

place and upon which it is claimed the charter of the corporation should be vacated or dissolved.]

Your petitioner hereby offers to furnish sufficient security to the satisfaction of the attorney general [or to the satisfaction of the court] to indemnify the [people of] the state of against costs in any action or proceeding brought upon this application.

[Date.]

A.... B....

[The facts which authorize the dissolution of the corporation should be set forth in affidavits attached to the request.]

[Notice of presentation of this request should be given to the proposed defendant.]

CHAPTER V.

APPOINTMENT OF GUARDIANS AD LITEM.

- | | |
|--|---|
| <p>93. Petition of infant plaintiff over fourteen.</p> <p>94. Consent of proposed guardian and affidavit as to responsibility.</p> <p>95. Petition of general guardian, relative or friend for appointment of guardian <i>ad litem</i> for an infant plaintiff under fourteen.</p> <p>96. Notice of foregoing application, to be given to the general guardian, or to the person with whom such infant resides.</p> <p>97. Order appointing guardian <i>ad litem</i> for infant plaintiff.</p> <p>98. Bond of guardian <i>ad litem</i> for infant plaintiff.</p> <p>99. Bond of guardian <i>ad litem</i> in partition.</p> <p>100. Petition for appointment of guardian <i>ad litem</i> for insane plaintiff.</p> <p>101. Petition by infant defendant over fourteen years of age.</p> <p>102. Petition by relative or</p> | <p>friend of infant defendant.</p> <p>103. Order appointing guardian of infant defendant.</p> <p>104. Petition of relative or friend for appointment of guardian for insane defendant.</p> <p>105. Petition by party to procure appointment of guardian <i>ad litem</i> for infant defendant under the age of fourteen, or who has neglected to apply.</p> <p>106. Affidavit and application in case of non-resident infant defendant (Wisconsin).</p> <p>107. Order on same.</p> <p>107a. Notice of application referred to in last preceding order.</p> <p>108. Application in case of non-resident infant defendant (Minnesota).</p> <p>109. Application in case of non-resident infant defendant (North and South Dakota).</p> <p>110. Order on same.</p> |
|--|---|

The general principle is that an infant cannot sue in his own name, nor can his general guardian maintain a suit for him without special appointment for that purpose unless expressly authorized by statute. Woerner, Amer. Law of Guardianship, sec. 63.

Under the statutes of the code states generally an infant plaintiff if over the age of fourteen may himself apply to the court for the appointment of a next friend or guardian *ad litem* to prosecute the action in his behalf. If he be under the age of fourteen the application must be made by his general guardian or, in the absence of such guardian, by a relative or friend. In case the infant has a general guardian, notice of such application must generally be given to such guardian.

In case of an infant plaintiff the application and appointment must be made before the action is commenced, and in case of an infant defendant the application must be made after service of the summons or other process and before answering.

As a general rule guardians *ad litem* must also be appointed to represent the interests of idiots, insane persons, and others under disability.

93. Petition of infant plaintiff over fourteen.¹

To the Court
of County.

[Or To the Hon. I.... K....

Judge, or Court Commissioner.]

THE PETITION of A.... B.... respectfully shows:

I. That he is an infant of the age of fourteen years and upward, and resides with his mother at and that he has no general or testamentary guardian [*or if he has a general or testamentary guardian, that L.... M.... is his general or testamentary guardian, who resides at*]

II. That your petitioner has a cause of action against C.... D...., of, for the partition of certain real estate in said county of, described as follows: [*insert description*] said real estate being owned by your petitioner and said C.... D.... as tenants in common [*or state briefly the facts constituting the cause of action upon which it is desired to bring the suit*], and that your petitioner is desirous of bringing an action in the court against said C.... D.... for the partition of said land.

III. That E.... F...., the uncle of your petitioner, who resides at is a competent and responsible person to become the guardian of your petitioner in such action, and that no previous application for the appointment of a guardian *ad litem* in this matter has been made [*or if a previous application has been made, state the facts showing why second application has become necessary*].

IV. [*If it is desired to have some person other than the general guardian appointed as guardian ad litem*]: That the said L.... M...., the general guardian of your petitioner, declines to be appointed guardian *ad litem* for the purpose of bringing this action, wherefore it is necessary that some other person be

¹ Wis. Stats. 1898 secs. 2613, 2614; C. C. Rule IX; Minn. Rev. Laws 1905 secs. 4057, 4058; Iowa Code secs. 3480, 3482-3484; N.

Dak. Rev. Codes secs. 5225, 5226; S. Dak. Rev. Code C. P. sec. 85; Cobbe's Ann. Stats. of Nebr. sec. 5373.

appointed for that purpose [*or state other cause why the general guardian should not be appointed*].

WHEREFORE your petitioner prays that E.... F.... or some other competent person may be appointed guardian *ad litem* of your petitioner, to prosecute such action in his behalf.

Dated, 19....

A.... B....

[*Venue*]

A.... B.... being first duly sworn says that he has read the foregoing petition by him and knows the contents thereof, and that the same is true of his own knowledge.

A.... B....

[*Jurat.*]

94. Consent of proposed guardian and affidavit as to responsibility.

[*Venue*]

E.... F.... being first duly sworn says that he resides at, in said county of, and is the general guardian of the infant named in the foregoing petition [*or if said infant has no general guardian that such infant has no general guardian*] and affiant believes that he is fully competent to properly understand and protect the rights of the said infant as guardian *ad litem* in the manner stated in the foregoing petition; that he is in no wise adversely interested to the interests of said minor in said matter, and is not connected in business with the adverse party nor with his counsel, and that he is financially responsible to answer for any liability he may incur as such guardian *ad litem*; and he hereby consents to act as such guardian.

E.... F....

[*Jurat.*]

95. Petition of general guardian, relative or friend for appointment of guardian ad litem for an infant plaintiff under fourteen.

To the Court of County.

[*Or to the Hon. I.... K....*

Judge, or Court Commissioner.]

THE PETITION of A.... B.... respectfully shows:

I. That your petitioner is a testamentary guardian of one C.... D...., an infant under fourteen years of age, duly appointed by the will of E.... F...., father of said infant [*or, is the general guardian of C.... D...., an infant of the age of fourteen years and upward, duly appointed on the day of, 19.., by the order of the court in the county*

of, *or*, is a relative, to-wit, the father, *or*, a friend of C. . . . D. . . . , an infant under the age of fourteen years].

II. That the said C. . . . D. . . . was of the age of years on the day of last and resides at [with the petitioner].

III. [*Set forth briefly the cause of action existing in favor of the infant, substantially as in Form 93.*]

IV. [*If the petitioner seeks the appointment of himself*]: That your petitioner is willing to become the guardian *ad litem* of the said C. . . . D. . . . for the purpose of prosecuting said action and [*add allegation of competence and responsibility as in Form 94*].

[*Or, if appointment of a third person is desired*]: That E. . . . F. . . . , who resides at , in said county, is fully competent to understand and protect the rights of the said minor [*add further allegations of competence as in Form 94*].

WHEREFORE your petitioner prays that he may be appointed [*or, that said E. . . . F. . . . may be appointed*] guardian *ad litem* of said minor to prosecute said action for him.

A. . . . B. . . .

[*Verification.*]

[*If the proposed guardian is other than the petitioner, add his consent as in Form 94.*]

96. Notice of foregoing application, to be given to the general guardian or to the person with whom such infant resides.²

[*Caption as in Form 3.*]

To L. . . . M. . . . [*insert name of general or testamentary guardian or person with whom the infant resides*].

TAKE NOTICE that upon the annexed petition [consent and affidavit] application will be made by the undersigned to the court of county [*or, the Hon. I. . . . K. . . . , Judge, or other officer to whom application is to be made*], on the day of , 19. . . , at o'clock in the forenoon, at the court house in the city of , in said county [*or name other place where the application is to be made*], for an order appointing E. . . . F. . . . guardian *ad litem* of the infant above named, and authorize him to prosecute the action referred to in said petition.

Dated , 19. . .

A. . . . B. . . .

² Wis. Stats. 1898 sec. 2614; N. Dak. Rev. Codes sec. 5226; S. Minn. Rev. Laws 1905 sec. 4058; Dak. Rev. Code C. P. sec. 85.

97. Order appointing guardian ad litem for infant plaintiff.
[Caption as in Form 3.]

Upon reading and filing the petition of A.... B.... duly verified, together with the written consent and affidavit of C.... D.... attached thereto [*if notice has been given to the general guardian or person with whom the infant resides; due notice having been given to the general guardian or, to X.... Y...., with whom said infant resides, of this application; proof of the due service of such notice having been presented and filed*] from all of which it satisfactorily appears that it is necessary that an action be brought on behalf of said infant in relation to the matters set forth in said petition, and that the said E.... F.... is a competent and responsible person to bring such action and represent said infant;

IT IS NOW ORDERED that the said E.... F.... be and he is hereby appointed guardian *ad litem* of said infant and authorized to bring and prosecute the action named in said petition in said infant's behalf upon his filing a bond according to law in the penal sum of dollars, with sufficient surety, to be approved by me, conditioned that he will faithfully account for and apply, under the direction of the court, any money or property of said ward which he may receive as such guardian and faithfully in all things discharge his trust as such guardian.

Dated, 19..

G.... H....
Judge.

98. Bond of guardian ad litem for infant plaintiff.³

KNOW ALL MEN by these presents that we, A.... B.... as principal, and C.... D.... and E.... F.... as sureties, all of, in the county of, state of, are held and firmly bound unto [*insert name of infant*], of, in the penal sum of dollars, to be paid to the said [*name of infant*] his executors, administrators or assigns, for which payment well and truly to be made we bind ourselves, our heirs, executors and administrators jointly and severally by these presents.

Sealed and dated the day of, 19..

Whereas the above bounden A.... B.... was, on the day of, 19.., duly appointed to appear as guardian *ad litem* for [*insert name of infant*] to prosecute an action on his behalf in the court of county against Q.... R...., which action is about to be begun [*or, is now pending*].

³ Wis. Stats. 1898 sec. 2617; N. Dak. Rev. Codes sec. 5228; S. Minn. Rev. Laws 1905 sec. 4057; Dak. Rev. Code C. P. sec. 86.

And whereas the said principal is, by virtue of such appointment, to receive moneys [*or*, property] of his said ward of the value of dollars.

NOW THEREFORE, the condition of this obligation is such that if the said A.... B.... shall faithfully discharge the trust committed to him in respect to said money or property, and account for and apply the same under the direction of the court, then this obligation to be void, otherwise of force.

	A.... B....	[Seal]
Signed, sealed and delivered	C.... D....	[Seal]
in presence of:	E.... F....	[Seal]
	G.... H....	
	I.... K....	

[*Venue*]

C.... D.... and E.... F.... being first duly sworn, each for himself says that he is a surety upon the foregoing bond, and that he is a resident and freeholder in said state and is worth the sum of dollars over and above his indebtedness and liabilities in property within this state not exempt from execution.

C.... D....
E.... F....

[*Jurat.*]

[*Approval to be endorsed on bond*]: I approve of the within bond as to the form and manner of execution and as to the sufficiency of sureties.

Dated, 19..

[*Signature of officer.*]

99. Bond of guardian ad litem in partition.⁴

KNOW ALL MEN by these presents, that we, A.... B...., of, as principal, and C.... D.... and E.... F...., of, as sureties, are held and firmly bound unto the State of Wisconsin in the penal sum of dollars, for which sum well and truly to be paid we bind ourselves, our heirs, executors and administrators jointly and severally by these presents.

Sealed and delivered the day of, 19..,

WHEREAS the above bounden principal is the general guardian duly appointed of one G.... H...., a minor [*or*, insane person] of, and whereas the said G.... H.... is a party plaintiff [*or*, defendant] in a certain action for partition pending in the court of county, and the said principal has been authorized by the said court to represent the interest of the said G.... H.... in said action [*or*, Whereas the above bounden

⁴ Wis. Stats. 1898 sec. 3104.

principal has been duly appointed by the court of county as the guardian *ad litem* of one G.... H.... in a certain partition action now pending in the said court, the said G.... H.... having no general guardian], and the said guardian having been required by the said court to give security for his acts as provided by law;

NOW THEREFORE the condition of this obligation is such that if the said A.... B.... shall faithfully perform his duties as such guardian and render a just and true account of his guardianship in all courts and places when thereto required, and observe all orders of the court in relation to his trust, then this obligation to be void, otherwise to remain in full force.

	A.... B.... [Seal]
Sealed and delivered	C.... D.... [Seal]
in presence of:	E.... F.... [Seal]
I.... K....	
X.... Y....	

[Add acknowledgment and justification of sureties and approval as in Form 98.]

100. Petition for appointment of guardian ad litem for insane plaintiff.⁵

To the Court of County.

[Or, to the Hon. I.... K....,

Judge, or, Court Commissioner.]

THE PETITION of A.... B.... respectfully shows:

I. That he is the father [or, brother, or, general guardian] of C.... D...., who is a resident of, county of, state of, and is now insane and has no general guardian. [If there has been an adjudication of insanity and a general guardian appointed], that said C.... D.... was by order of the court of county, duly made on the day of, 19.., adjudged to be insane and incompetent to have charge and management of his property, and that your petitioner was thereupon duly appointed his general guardian.

II. That the said C.... D.... owns an undivided one-fourth interest in certain land situated in said county and that it is necessary that an action be brought in his behalf in the said court for the purpose of obtaining partition of said land [or state briefly the cause of action necessary to be brought on behalf of the ward].

⁵ Wis. Stats. 1898 sec. 2616; C. C. Rule IX; Minn. Rev. Laws 1905 sec. 3838; Iowa Code sec. 3481;

N. Dak. Rev. Codes sec. 6554; S. Dak. Rev. Code C. P. sec. 379; Cobb. Ann. Stats. Nebr. sec. 5385.

III. That E.... F...., of, is a competent and responsible person and a relative, to-wit, an uncle of said C.... D...., and is in no wise adversely interested or connected in business with the adverse parties or their counsel, and that no previous application has been made for the appointment of a guardian *ad litem* in this matter [*or if a previous application has been made, state the facts showing why second application has become necessary*].

WHEREFORE your petitioner, on behalf of the said C.... D.... prays that the said E.... F.... or some other suitable person be appointed such guardian to prosecute such action in behalf of the said C.... D....

Dated, 19..

A.... B....

[*Verification and consent of guardian ad litem and order appointing as in previous forms in this chapter.*]

101. Petition by infant defendant over fourteen years of age.⁶

[*Title of cause.*]

To the Court of County.

[*Or, to the Hon. I.... K....,*

Judge, *or*, Court Commissioner.]

THE PETITION of A.... B...., one of the defendants above named, respectfully shows:

I. That an action has been commenced in this court against your petitioner by one C.... D...., the object of which action is to [*here briefly describe or state the object of the action*].

II. That your petitioner is an infant of more than fourteen years, to-wit, of the age of years on the day of, 19.., and that he resides with his father at, and that G.... H.... is his general guardian [*or, that petitioner has no general guardian*].

III. That twenty days have not elapsed since the service of the summons in this action upon your petitioner [*or, that no application for appointment of a guardian ad litem to appear on behalf of your petitioner in said action has been made to the best of your petitioner's knowledge and belief*].⁷

⁶ Wis. Stats. 1898 sec. 2614 sub. 2; Minn. Rev. Laws 1905 sec. 4058 sub. 2; Iowa Code secs. 3483, 3484; N. Dak. Rev. Codes sec. 5226 sub. 2; S. Dak. Rev. Code C. P. sec. 85 sub. 2; Cobbe's Ann. Stats. of Nebr. sec. 5373.

⁷ It seems that after the expiration of twenty days the infant may still apply unless an application has been previously made by the adverse party. *McConnell v. Adams*, 3 Sandf. 728.

WHEREFORE your petitioner prays that E.... F.... may be appointed his guardian *ad litem* to appear and defend said action on his behalf.⁸

Dated, 19..

A.... B....

[*Verification, consent of proposed guardian, and proof of competency, as in preceding forms of this chapter.*]

102. Petition by relative or friend of infant defendant.⁹

[*Title of cause.*]

To the Court of County.

[*Or, To the Hon. I.... K....,
Judge, or Court Commissioner.*]

THE PETITION of A.... B.... respectfully shows:

I. That an action has been commenced in this court by the service of summons upon C.... D...., one of the defendants above named, and that the object of said action is [*here state the object of action*].

II. That the defendant C.... D.... is an infant of the age of years on the day of, 19.. [*and if he is over fourteen years of age add: and has neglected to apply for the appointment of a guardian ad litem to represent him in this action*]; that the said minor resides with your petitioner, who is his father [*or other relative*] and that he has no general or testamentary guardian within this state [*or if the minor have a guardian, state his name and residence*].

WHEREFORE your petitioner prays that a guardian *ad litem* be appointed to appear and defend said action on behalf of the said infant.

Dated, 19.. ,

A.... B....

[*Verification, consent of proposed guardian, and proof of competency as in preceding form.*]

103. Order appointing guardian of infant defendant.¹⁰

[*Title of court and of cause.*]

Upon reading and filing the annexed petition praying the appointment of a guardian *ad litem* for C.... D...., an infant

⁸ In Wisconsin no person except an attorney or officer of the court can be appointed guardian *ad litem* of an infant defendant. C. C. Rule IX.

⁹ Notice of this application must first be given to the general or

testamentary guardian of the infant if he have one; and if not, then to the infant himself if over fourteen years of age, or if under that age to the person with whom such infant resides.

¹⁰ Wis. Stats. 1898 sec. 3104.

and one of the defendants in the above entitled action, and it appearing to the court that E.... F.... is a competent and responsible person and an attorney of this court, and that he has consented to act as such guardian;

IT IS ORDERED that the said E.... F.... be and he hereby is appointed guardian *ad litem* for the said C.... D.... and is authorized and directed to appear and defend said action on his behalf. [*In partition actions add: upon his giving bond to the state, to be filed with the clerk of this court, in the penal sum of dollars, with sureties, to be approved by the judge of this court, conditioned for the faithful performance of his duties as guardian, and that he will render a just and true account of his guardianship in all courts and places when thereunto required and observe all orders of the court in relation to his said trust.*]

[*Date.*]

I.... K....
Judge.

104. Petition by relative or friend for appointment of guardian for insane defendant.¹¹

[*Title of court and of cause.*]

To the Court of County.

[*Or, To the Hon. I.... K....*

Judge, or, Court Commissioner.]

THE PETITION of A.... B.... respectfully shows:

I. That an action has been commenced in this court between the parties above named by the issuance of a summons, and the service thereof, upon some of the defendants.

II. That C.... D...., one of the said defendants, is an insane person totally incapable of conducting the defense of said action, and that he is of full age, to-wit, of the age of years, and has no general guardian, and resides with your petitioner.

III. That your petitioner has no interest adverse to the rights of the said C.... D.... and is not connected in business with the attorney or counsel of the adverse party.

WHEREFORE your petitioner prays that he may be appointed the guardian of the said C.... D.... for the purposes of this action.

Dated, 19..

A.... B....

[*Verification, consent, and proof of competency as in preceding forms in this chapter.*]

¹¹ Wis. Stats. 1898 secs. 2615, 2616; Minn. Rev. Laws 1905 sec. 3838; Iowa Code sec. 3485; N. Dak. Rev. Codes sec. 5227; S. Dak. Rev. Pro. C. sec. 379; Cobey's Ann. Stats. of Nebr. sec. 5384.

105. Petition by party to procure appointment of guardian ad litem for infant defendant under the age of fourteen, or who has neglected to apply.

[*Title of court and of cause.*]

To the Court of County.

[*Or, To the Hon. I.... K....*

Judge, *or*, Court Commissioner.]

THE PETITION of A.... B...., the plaintiff in this action [*or, one of the defendants in this action*] respectfully shows:

I. That said action has been commenced and is now pending in this court for the purpose of [*here state briefly the object of the action*] and that the summons therein has been served upon the defendant C.... D.... as appears by the summons and proof of service thereof now on file in this court.

II. That the said defendant C.... D.... is an infant less than fourteen years of age, to-wit, of the age of years on the day of, 19.. [*or, if the infant be over fourteen years of age, more than fourteen years of age, to-wit, of the age of years on the day of, 19.., and that although more than twenty days have elapsed since the service of the summons herein upon him, he has neglected to apply for the appointment of a guardian ad litem in this action*], and that no application for the appointment of such guardian *ad litem* has been made by any relative or friend of said infant [*or if previous application has been made state facts showing why second application has become necessary*].

III. That said infant resides with his mother, E.... F...., at, and has not, to the best of the knowledge and information of your petitioner, any general or testamentary guardian within this state [*or, if the infant have a general guardian, state the name and residence of such guardian*].

WHEREFORE your petitioner prays that some suitable and competent person be appointed guardian *ad litem* for said defendant to defend said action in his behalf.

Dated, 19..

A.... B....

[*Verification.*]

106. Affidavit and application in case of non-resident infant defendant (Wisconsin).¹²

[*Title of court and cause.*]

[*Venue.*]

A.... B.... being duly sworn says that he is the plaintiff [*or, one of the defendants*] in the above entitled action; that

¹² Wis. Stats. 1898 sec. 2614 sub. 3.

said action has been commenced and is now pending in this court and is brought for the partition of certain real estate situate in said county of [*or otherwise state briefly the purpose of the action*]; that the defendant C.... D.... is a necessary or proper party to said action and is an infant over fourteen years of age [*or, under fourteen years of age*], and that he resides without this state, to-wit, at in the city of [*and in case the infant be under fourteen years of age, with one E.... F...., the mother of said infant*]; [*or, in case the residence of the infant be unknown, that said infant is a resident of this state and his residence is not known to the affiant, nor can the same be ascertained, though diligent inquiry has been made by affiant for that purpose*].

That no appearance by or on behalf of said infant and no application for the appointment of a guardian *ad litem* by him or on his behalf has been made to the best of affiant's knowledge and belief; that said C.... D.... has no general or testamentary guardian in this state; and that this affidavit is made for the purpose of basing thereon an application for the appointment of a guardian *ad litem* for said infant.

A.... B....

[*Jurat.*]

107. Order on same.

[*Title of court and of cause.*]

On reading and filing the affidavit of A.... B...., the plaintiff [*or, one of the defendants*] in the above entitled action, from which it satisfactorily appears that the above entitled action has been commenced and is now pending in this court; that C.... D.... is a necessary or proper party thereto; that he is an infant over the age of fourteen years [*or, under the age of fourteen years*] and has no general or testamentary guardian in this state; that he resides at, in the state of [*if under the age of fourteen years, with E.... F...., his mother*] [*or, if the infant's residence be unknown, that the residence of said infant is unknown and cannot with due diligence be ascertained*]; and that no guardian has been appointed for him in this action; now, upon motion of G.... H...., attorney for the plaintiff [*or, of said defendant*];

IT IS ORDERED that said application be made before this court [*or, before the undersigned circuit judge, county judge, or, court commissioner*] at in the county of, on the day of, 19.., at o'clock in the noon; that notice of this application be served upon the said infant by mailing a copy of the notice hereto attached and this order to

said infant directed to him at his said place of residence with the postage thereon prepaid, and that such mailing be completed at least days before the day herein appointed for the hearing of this application [*if the infant be under fourteen years of age the direction should be, that a copy be mailed to E. . . . F. . . . with whom the infant resides*]; [*if the residence be unknown substitute, and that notice of this application be made by publication thereof in the X. . . . Y. . . . Z. . . . , a newspaper printed and published at the city of , in the county of , once in each week for four weeks successively prior to the hearing of said application, the said newspaper being designated as most likely to give notice to the said infant*].

Dated , 19..

I. . . . K. . . .

Circuit Judge.

[*Or, County Judge, or
Court Commissioner.*]

[*Written consent by the proposed guardian ad litem and proof of his competency, as in preceding forms in this chapter, must be filed prior to his appointment.*]¹³

107a. Notice of application referred to in last preceding order.

[*Title of court and of cause.*]

To the above named infant defendant, C. . . . D. . . . :

You are hereby notified that pursuant to the terms of an order made by I. . . . K. . . . , circuit judge [*or, county judge, or court commissioner*] in the above entitled action, on the day of , 19.. , application will be made to the court of county [*or, to the Hon. I. . . . K. . . . , circuit judge, or county judge, or court commissioner*] at , in the county of , on the day of , 19.. , at o'clock noon, for the appointment of a guardian *ad litem* to appear for you and defend the above entitled action.

Dated , 19..

A. . . . B. . . .

Plaintiff above named.

108. Application in case of non-resident infant defendant (Minnesota).

[*Title of court and of cause.*]

To the District Court of County.

[*Or, To the Hon. I. . . . K. . . . District Judge.*]

The PETITION of A. . . . B. . . . , the plaintiff in the above entitled action, respectfully shows:

¹³ The guardian must be an attorney or officer of the court. C. C. Rule IX.

I. That the above entitled action has been commenced and is now pending in the said court for the purpose of [*here state briefly the purpose of the action*]; that the defendant C.... D.... is a necessary or proper party to said action; that he is an infant who has no general or testamentary guardian within this state, and further, that he is not within this state.

II. That no appearance by or on behalf of said infant has been made in this action, and that no application for the appointment of a guardian *ad litem* by him or on his behalf has been made, to the best of this deponent's knowledge and belief.

III. That on the day of, 19.., at o'clock in the noon, at the court house in the city of, in said county, this application will be presented to the said court, or to I.... K...., district judge, for the purpose of securing the appointment of a guardian *ad litem* for the said infant defendant.

WHEREFORE your petitioner prays that E.... F...., who is a competent and responsible person, be appointed guardian *ad litem* of the said infant defendant for the purposes of this action.

Dated, 19..

A.... B....

[*Add verification.*]

[*Before appointment is made the consent of the proposed guardian ad litem, and proof of his fitness and responsibility should be filed. The Minnesota statutes provide that notice of this application is to be given by the publication of a copy thereof once in each week for three successive weeks in a newspaper published in the county in which the action is brought, if there be one, and if not, in a newspaper published at the capital of the state. Minn. Rev. Laws 1905 sec. 4058 sub. 2.*]

109. Application in case of non-resident infant defendant (North and South Dakota).¹⁴

[*Title of court and of cause.*]

To the District Court
of County.

THE PETITION of A.... B.... respectfully shows:

I. That he is the plaintiff in the above entitled action; that said action has been commenced and is now pending in said court

¹⁴ N. Dak. Rev. Codes sec. 5226 sub. 2; S. Dak. Rev. Code C. P. sec. 85. In both North and South Dakota a guardian *ad litem* for a non-resident infant defendant may be appointed in actions for the partition of real property or the

foreclosure of a mortgage or other instrument, and in South Dakota in all actions affecting the title to real property or wherein such infant is a necessary or proper party defendant.

for the partition of certain real estate in county [*or otherwise state the object of the action*]; that the defendant, C.... D...., is a necessary or proper party to said action and that said defendant is an infant and resides out of this state, to-wit, at, in the state of [with L.... M...., his mother].

II. That no appearance by or on behalf of said infant, and no application for the appointment of a guardian *ad litem* by him or on his behalf has been made, to the best of petitioner's knowledge and belief.

WHEREFORE your petitioner prays that E.... F...., who is a suitable and proper person, be appointed guardian *ad litem* for the said infant defendant for the purposes of this action.

Dated, 19..

A.... B....

[*Add verification, consent and proof of fitness of proposed guardian.*]

110. Order on same.

[*Title of court and of cause.*]

On reading and filing the verified petition of A.... B...., plaintiff in the above entitled action, from which it appears that this action has been commenced and is pending for the partition of real property [*or state briefly the object of the action*]; that the defendant, C.... D...., is an infant and resides out of this state and is a necessary or proper party to this action; that he has no guardian *ad litem*, and that E.... F.... is a suitable and proper person to be appointed guardian *ad litem* of said infant for the purposes of the action, and the said E.... F.... having consented to act as such;

IT IS ORDERED that the said E.... F.... be appointed such guardian *ad litem* of the infant defendant C.... D.... for the purposes of this action, unless the said C.... D.... or some person in his behalf, within days after the service of a copy of this order, shall procure to be appointed a guardian for the said infant defendant.

And it is further ordered that this order be served upon the said infant defendant, personally, at his residence in the city of, county of, state of, within days from the date hereof, by delivering to and leaving with him a true copy of this order [*or provide by special direction for service by mail upon the said infant or the person with whom he resides.*]

Dated, 19..

I.... K....

District Judge.

CHAPTER VI.

SUMMONS, NOTICE OF OBJECT OF ACTION AND LIS PENDENS.

- | | |
|---|---|
| <p>111. Summons (Wisconsin).
 112. Summons, complaint served (Minnesota).
 113. Original notice, complaint not yet filed (Iowa).
 114. The same, with notice of no personal claim (Iowa).
 115. Original notice to unknown defendants (Iowa).
 116. Summons (North Dakota).
 117. Summons, money demand (South Dakota).
 118. Summons, equitable relief (South Dakota).
 119. Summons (Nebraska).
 120. Notice of object of action in foreclosure.
 121. The same, in partition.
 122. Lis pendens in foreclosure.
 123. The same, in partition.
 124. The same, in an action to quiet title.</p> | <p>125. The same, in an action to foreclose a mechanics lien.
 126. The same, in an action to establish a trust.
 127. The same, in an action for specific performance.
 128. The same, in ejectment.
 129. The same, in an action in which a warrant of attachment affecting real property has been issued (South Dakota).
 129a. Lis pendens in application for laying out, widening, vacating or extending street, alley, water channel, park, highway, or other public place (Wisconsin).</p> |
|---|---|

111. Summons (Wisconsin).¹

STATE OF WISCONSIN.

..... Court, ... County.

A.... B....,	}	Plaintiff,
vs.		
C.... D....,		
		Defendant.

THE STATE OF WISCONSIN to the said Defendant:

You are hereby summoned to appear within twenty days after service of this summons, exclusive of the day of service, and defend the above entitled action in the court aforesaid; and in

¹ Wis. Stats. 1898 sec. 2631.

case of your failure so to do judgment will be rendered against you according to the demand of the complaint, of which a copy is herewith served upon you.

E.... F...., Plaintiff's Attorney.

P. O. Address, County, Wis.

[If the complaint be not served with the summons the words "of which a copy is herewith served upon you" may be omitted or erased.]

112. Summons, complaint served (Minnesota).²

STATE OF MINNESOTA,
County of

In District Court.
.... Judicial Court.

A.... B....,	}
Plaintiff,	
vs.	
C.... D....,	
Defendant.	

The State of Minnesota to the above-named defendant:

You are hereby summoned and required to serve your answer to the plaintiff's complaint hereto attached on the subscriber by copy, at his office in the city of, ... county, Minnesota, within twenty days after the service upon you of this summons exclusive of the day of service; and if you fail so to serve your answer, the plaintiff* will take judgment against you for the sum of dollars with interest thereon, at the rate of per cent per annum from the day of, 19.., together with the costs and disbursements of this action.

[Above to be used in case of a debt or liquidated money demand; in other actions insert after the *] will apply to the court for the relief demanded in the complaint.

Dated, 19..

E.... F...., Plaintiff's Attorney,
....., Minnesota.

[In divorce actions the summons should require service of the answer within thirty days. Minn. Rev. Laws 1905, sec. 3580. In all actions a copy of the complaint must be served with the summons unless the complaint be filed with the clerk of the court, in which case the words "hereto attached" in the foregoing form should be left out, and a clause added notifying the defendant that the complaint has been so filed. Minn. Rev. Laws 1905, sec. 4105. In mechanic's lien actions the summons

² Minn. Rev. Laws 1905 sec. 4103.

is special and must state that the complaint has been filed with the clerk, that the action is brought to foreclose a lien, giving the amount thereof, a brief description of the premises, and of the improvement out of which the lien arose, and require the defendant to file his answer within twenty days after service upon him. Minn. Rev. Laws 1905, sec. 3514.]

113. Original notice, complaint not yet filed (Iowa).³

[Title of court and of cause.]

To C.... D...., defendant:

You are hereby notified that on or before the day of; 19.., a petition of A.... B.... will be filed in the office of the clerk of the district court of the state of Iowa in and for county, claiming of you the sum of dollars as justly due said plaintiff on a promissory note executed by the defendant to the plaintiff and now owned by the plaintiff [*or otherwise state in general terms the cause of action*], and that unless you appear thereto * and defend on or before noon of the second day of the term, 19.., of said court, which will commence upon the day of, 19.., at the court house in, ... county, Iowa, default will be entered against you and judgment [*or decree*] rendered thereon.

A.... B...., Plaintiff.

[*Or E.... F....*

Attorney for Plaintiff.]

[In case the complaint has been filed before the service of notice, the statement in the foregoing form, that the complaint will be filed on or before a certain day, should be stricken out and instead thereof a statement inserted to the effect that the complaint has been filed.]

114. The same, with notice of no personal claim (Iowa).

[Title of court and of cause.]

To C.... D.... and E.... F....,

the defendants above named:

You and each of you are hereby notified that there is now on file [*or, that on or before the day of, 19.., there will be on file*] in the office of the clerk of the district court of county, Iowa, a petition of the above named plaintiff claiming a personal judgment against the defendant [*insert name of maker of note*] for dollars with interest thereon at per cent from the day of, 19.., as justly due the plaintiff upon a certain promissory note dated the day of, 19.., executed and delivered by [*name maker of note*] to the plaintiff, also for the costs of this action

³ Iowa Code sec. 3514.

with dollars attorney's fees as provided in said note, and claiming against all of said defendants the foreclosure of a certain mortgage of even date with said note, and securing the same, upon the following described real estate [*here insert description of real estate covered by the mortgage*], but no personal claim is made against any of you except [*insert name of the maker of the note*], and you are hereby notified that unless you appear hereto [*here proceed as in Form 113 from the *.*]

115. Original notice to unknown defendants (Iowa Code sec. 2538).

STATE OF IOWA.

.... Court County.

A.... B.... ,
Plaintiff,

vs.

The Unknown Claimants of
the property hereinafter
described.

To the Unknown Claimants of [*here insert full description of the property*] :

You and each of you are hereby notified that there is now on file in the office of the clerk of the district court of county, Iowa, a petition of the above named plaintiff claiming [*here insert a full statement of all the material averments of the petition, describing the property involved and setting forth all the statements of the petition relating to the defendants interest and the mode of devolution thereon and the relief demanded*], and that unless you appear thereto and defend on or before noon of the second day of the term, 19.., of the said court, which commences on the day of, 19.., at the court house in, county of, state of Iowa, default will be entered against you and decree rendered thereon.

C.... D....

Plaintiff's Attorney.

116. Summons (North Dakota).⁴

[*Title of court and of cause.*]

THE STATE OF NORTH DAKOTA to the above named defendant:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer upon the subscriber

⁴ N. Dak. Rev. Codes sec. 5248.

within thirty days after the service of this summons upon you, exclusive of the day of service, and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated, 19..

E.... F...., Plaintiff's Attorney.

P. O. Address:, N. Dak.

[In case the complaint is not served with the summons a statement should be added to the summons as follows]: Said complaint is [or, will be] filed in the office of the clerk of the said district court.

117. Summons, money demand (South Dakota).⁵

STATE OF SOUTH DAKOTA.

Circuit Court of County.

A.... B....,	}
Plaintiff,	
vs.	
C.... D....,	
Defendant.	

THE STATE OF SOUTH DAKOTA to the above named defendant:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer upon the subscriber within thirty days after the service of this summons upon you, and in case of your failure to answer the said complaint the plaintiff will take judgment against you for the sum of dollars, with costs and disbursements of this action.

Dated, 19..

E.... F...., Plaintiff's Attorney.

P. O. Address:, S. Dak.

118. Summons, equitable relief (South Dakota).⁶

[Title of court and of cause.]

THE STATE OF SOUTH DAKOTA to the above named defendant:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer upon the subscriber within thirty days after the service of this summons upon you,

⁵ S. Dak. Rev. Code C. P. sec. 105.

⁶ S. Dak. Rev. Code C. P. sec. 105.

and in case of your failure to answer the said complaint the plaintiff will apply to the court for the relief demanded in the complaint.

Dated, 19..

E.... F...., Plaintiff's Attorney.

P. O. Address:, S. Dak.

119. Summons (Nebraska; Cobbey's Ann. Stats. of Nebr. sec. 1065).

[*Venue.*]

To the Sheriff of said County:

You are hereby commanded to notify the defendant, C.... D.... [*or* C.... D.... and E.... F....], that he [*or* they] has [*or* have] been sued by A.... B...., plaintiff, in the district court for said county, and that he [*or* they] must answer the petition filed by said plaintiff on or before the day of, 19.., or such petition will be taken as true and judgment rendered accordingly.

You will make due return of this summons on the day of, 19..

WITNESS my signature and the seal of said court this day of, 19..

L.... M....

Clerk.

[*Venue.*]

Received on the day of, 19..

I hereby certify that on the day of, 19.., I served the above summons on the above named C.... D.... [*or* C.... D.... and E.... F....] by [*state manner of service*] a true and certified copy of the same, with all endorsements thereon, in the county aforesaid.

O.... P....

Sheriff.

FEES.

Service and Return....\$

Copy

Mileage

TOTAL

[*Where the action is for the recovery of money only the following endorsement should appear on the writ*]:

If defendant fail to appear and answer, the plaintiff will take judgment for dollars.

L.... M....

Clerk.

Returnable on the day of, 19..

G.... H....

Plaintiff's Attorney.

I hereby certify that this is a true copy of original summons, with all endorsements thereon.

O.... P....
Sheriff.

120. Notice of object of action in foreclosure.⁷

STATE OF
..... Court County.

A.... B....,	}	Plaintiff,
vs.		
C.... D...., et al.,		
Defendants.		

To [name defendants against whom no personal claim is made], defendants aforesaid:

The object of the above entitled action, in which a summons is herewith served upon you, is * to foreclose a mortgage executed by E.... F.... and A.... F...., his wife, to the plaintiff [or, to one G.... H....] upon the premises hereinafter described, on the day of, 19.., for the sum of dollars, with interest from the day of, 19.., at per cent per annum, and which said mortgage was recorded on the day of, 19.., at o'clock .. M., at page, of volume of mortgages, in the office of the register of deeds of said county of and state of, ** and that the premises affected in this action are described as follows: [here insert accurate description of the property as described in the complaint.] That said described property and no other is affected by the above entitled action, and no personal claim is made against you or either of you.

Dated, 19..

J.... K....
Plaintiff's Attorney.

121. The same, in partition.

[Proceed as in Form 120, and insert between * and ** the following]: to have partition adjudged of the premises hereinafter described among the owners thereof, or to obtain a sale

⁷This notice must be served with summons upon all defendants against whom no personal claim is made. Wis. Stats. 1898 sec. 2634; Minn. Rev. Laws 1905 sec. 4390; N. Dak. Rev. Codes

sec. 5250; S. Dak. Rev. Code C. P. sec. 107. In Iowa the substance of this notice must be inserted in the original notice (see form of original notice in Iowa, in this chapter).

thereof and a division of the proceeds among the owners if it shall appear that partition of the same cannot be made without great prejudice to said owners.

[For suitable language to be inserted in other actions affecting the title to real property, see the various forms given in this chapter for notices of pendency of action.]

122. Lis pendens in foreclosure.^a

State of.....
..... Court County.

A... B....,	} Plaintiff,
vs.	
C.... D....,	
Defendant.	

NOTICE is hereby given that an action has been commenced and is pending in the above named court, upon a complaint of the above named plaintiff against the above named defendant; that the object of said action is * to foreclose a mortgage bearing date the day of, 19.., executed by E.... F.... and A.... F...., his wife, to the plaintiff [*or*, to one G.... H....] and recorded in the office of the register of deeds for county, ..., on the day of, 19.., at o'clock .. M, in volume of mortgages, page**; and that said action affects the title to the real estate described as follows, to-wit: [*here insert accurate description of the property affected as the same is described in the complaint or petition.*]

Dated, 19..

J.... K....

Plaintiff's Attorney.

[If the defendant in his answer sets up an affirmative cause of action affecting real property, he may also file a lis pendens, in which case the forms herein given may be used with suitable changes.]

^a Wis. Stats. 1898 sec. 3187; Minn. Rev. Laws 1905 sec. 4389; N. Dak. Rev. Codes sec. 5251; S. Dak. Rev. Code C. P. sec. 108; Cobbey's Ann. Stats. of Nebr. sec. 1086. In Iowa this notice is only to be filed when a part of the

property which is the subject of the action is situated in another county than the one in which the action is brought, and the notice is to be filed with the clerk of the district court of said county. Iowa Code sec. 3544.

123. The same, in partition.

[*Between * and ** insert*]: to have partition adjudged of the lands hereinafter described among the owners thereof, or for sale thereof and division of the proceeds among the owners according to their respective rights and interests, if it shall appear that partition cannot be made without prejudice to said owners.

124. The same, in an action to quiet title.

[*Between * and ** insert*]: to quiet the title to the lands hereinafter described and to establish plaintiff's claim against any claim of defendants thereto and forever bar said defendants from any right or title in the said lands adverse to plaintiff.

[*For use in Wis.; in other states follow the wording of the particular statute in stating the purpose.*]

125. The same, in an action to foreclose a mechanic's lien.

[*Between * and ** insert*]: to foreclose and enforce a mechanics lien upon the premises hereinafter described and the dwelling house [*or, the building, describing it*] situate thereon, for work, labor and services performed [*and materials furnished*] in and about the erection of the said dwelling house [*or, other building*], such lien having attached to said property pursuant to the laws of the state of, and amounting to the sum of dollars, together with the costs of this action.

[*In Minn. insert copy of summons. Minn. R. L. sec. 3505.*]

126. The same, in an action to establish a trust.

[*Between * and ** insert*]: to establish in favor of the plaintiff a trust in the lands hereinafter described and to compel the defendant to convey the said premises to the plaintiff.

127. The same, in an action for specific performance.

[*Between * and ** insert*]: to enforce the specific performance of a certain contract in writing made between the plaintiff and one C. . . . D. . . ., dated, 19. . ., and recorded in the office of the register of deeds of county on the day of, 19. . ., in book, on page, by which contract the said C. . . . D. . . . agreed among other things to convey to the plaintiff, his heirs or assigns, the premises hereinafter described, upon due payment of the consideration therein named and performance of the other terms of said contract, and said contract having been duly performed by the plaintiff on his part.

128. The same, in ejectment.

[*Between * and ** insert*]: to recover the possession of the premises hereinafter described, together with damages for the

unlawful withholding thereof and for waste done thereto in the sum of dollars.

129. The same, in an action in which a warrant of attachment affecting real property has been issued (South Dakota).^a

[*After * insert*]: to recover judgment upon a promissory note executed and delivered by the defendant, C.... D...., to the plaintiff for the sum of dollars [*or otherwise state the object of the action and the relief demanded*] and that a warrant of attachment was on the day of, 19.., duly issued out of this court in this action against the defendant C.... D...., and directed to the sheriff of the county of, and delivered to him for execution, whereby the following real property is intended to be affected [*here describe accurately the property attached.*]

Dated, 19..

E.... F....
Plaintiff's Attorney.

129a. Lis pendens in application for laying out, widening, vacating, or extending street, alley, water channel, park, highway, or other public place (Wis. Stats. 1898 sec. 3187a as amended by Laws 1905 c. 227).

[*Insert appropriate title of proceedings, as for instance*]:

In the matter of the application of
A.... B...., C.... D.... [etc.,
naming all petitioners] to the com-
mon council of the city of
for the laying out of a certain street
in said city, and the condemnation
of lands therefor.

To whom it may concern:

Notice is hereby given that the undersigned petitioners A.... B...., C.... D.... [*etc., giving names of all*], will on the day of, 19.., file with O.... P...., Esq., city clerk of the city of, their application in writing to the common council of said city, for the laying out and opening of a certain street or highway in said city, extending from to [*name termini*], and praying that the following described

^a S. Dak. Rev. Code C. P. sec. 108.

parcels of land be taken and condemned for such purpose [*describe the parcels with accuracy, as in a deed.*]

Notice is further hereby given that a correct map of the said proposed street or highway, and of the land to be affected thereby, is hereby attached to and made part of this notice, marked Exhibit "A."

Dated, 19....

A.... B....

C.... D....

E.... F....

CHAPTER VII.

PERSONAL, SUBSTITUTED AND CONSTRUCTIVE SERVICE.

- | | |
|---|--|
| 130. Certificate of personal service by sheriff. | 145. The same, in foreclosure of mortgage or lien (Wisconsin). |
| 131. Affidavit of personal service of summons by a person not an officer. | 146. The same, in divorce (Wisconsin). |
| 132. Affidavit of service on infant defendant. | 147. The same, against private corporation without officers (Wisconsin). |
| 133. Affidavit of service on defendant judicially declared to be incompetent. | 148. The same, defendants unknown (Wisconsin). |
| 134. Affidavit of service on member of family, defendant not found. | 149. Supporting affidavit of sheriff to accompany the foregoing (Wisconsin). |
| 135. Affidavit of service on municipal corporation. | 150. Order of publication, defendant foreign corporation (Wisconsin). |
| 136. Affidavit of service on business corporation. | 151. The same, defendant non-resident or residence unknown (Wisconsin). |
| 137. Sheriff's return of personal service of original notice (Iowa). | 152. The same, defendant absconded or concealed (Wisconsin). |
| 138. Affidavit of service by one not an officer. | 153. The same, defendant claiming interest in property (Wisconsin). |
| 139. Affidavit to allow service of original notice on Sunday. | 154. The same, in foreclosure (Wisconsin). |
| 140. Return of service of original notice on member of family (Iowa). | 155. The same, action to foreclose lien other than mortgage (Wisconsin). |
| 141. Admission of personal service by defendant. | 156. The same, in divorce. |
| 142. Affidavit for publication of summons, defendant non-resident or residence unknown, or a foreign corporation (Wisconsin). | 157. The same, defendant a domestic corporation without proper officers (Wisconsin). |
| 143. The same, defendant absconding or concealed (Wisconsin). | 158. The same, unknown defendants. |
| 144. The same, defendant claiming interest in property (Wisconsin). | 159. Affidavit of mailing (Wisconsin). |
| | 160. Affidavit of publication (Wisconsin). |

- | | |
|---|---|
| <p>161. Affidavit of service without the state (Wisconsin).</p> <p>162. Affidavit for publication, defendant non-resident and not found (Minnesota).</p> <p>163. The same, residence of defendant unknown (Minnesota).</p> <p>164. The same, defendant foreign corporation (Minnesota).</p> <p>165. The same, defendant absconding or concealing himself (Minnesota).</p> <p>166. Affidavit for service by publication (Iowa).</p> <p>167. Affidavit for publication of summons (South Dakota).</p> <p>168. Supporting affidavit by sheriff (South Dakota).</p> | <p>169. Order of publication (South Dakota).</p> <p>170. Affidavit for publication against unknown defendants, in foreclosure (South Dakota).</p> <p>171. Order for publication against unknown defendants, in foreclosure (South Dakota).</p> <p>172. Affidavit for publication (Nebraska).</p> <p>173. Notice to be published, defendant not found (Nebraska).</p> <p>174. Affidavit for publication, unknown heirs (Nebraska).</p> <p>175. Order of publication on unknown heirs (Nebraska).</p> <p>176. Notice to be published, unknown heirs (Nebraska).</p> |
|---|---|

As jurisdiction of the defendant depends upon proper service of the summons, and as the record is required to show such service, it is very evident that in default of an appearance on the part of the defendant the proof of service is of the utmost importance. In the code states generally the statutes require the service of the summons, and accompanying complaint or notice of object of action if served with summons, to be made by delivering a copy thereof to the defendant. While the provisions of the various states are not all exactly alike they are substantially similar, and generally speaking it may be said that service may be made as follows:

1. If the action be against a minor under fourteen years of age service is to be upon the minor personally and also upon the guardian if he have one, or if he have none upon his father or mother, or in default of either of these persons upon the person with whom the minor resides or who has custody of his person.

2. If the action be against a person judicially declared to be incompetent the service is to be made upon such person and upon his guardian.

3. If the action be against a joint stock company or domestic corporation the service is to be made upon certain specified officers of such company or corporation; if against a foreign corporation, upon certain specified agents within the state if such exist.

4. In all other cases the service is to be made upon the defendant personally, or if not found, by leaving a copy thereof at his usual place of abode in presence of some member of the fam-

ily of suitable age and discretion, who shall be informed of the contents thereof.¹

In Iowa the original notice must be served by reading it to the defendant, or offering to do so in case he neglects or refuses to hear it read, and in either case by delivering to him personally a copy thereof, or if he refuses to receive it by offering to do so, or if the defendant be not found within the county of his residence by leaving a copy thereof at his usual place of residence with some member of the family over fourteen years of age. Iowa Code sec. 3518.

The statutes of the various states generally provide that the summons may be served by the sheriff or by any other person not a party to the action.²

In Nebraska the summons must be served by the officer to whom it is directed, or by any person not a party to the action appointed by the officer to whom it is directed, and the authority of such person shall be endorsed upon the summons. Cobbey's Ann. Stats. of Nebr. sec. 1069.

In Iowa the original notice may be served by any person not a party to the action. Iowa Code sec. 3516.

130. Certificate of personal service by sheriff.³

State of
..... Court County.

A.... B....,	}
Plaintiff,	
vs.	
C.... D....,	}
Defendant.	

I HEREBY CERTIFY that on the day of, 19..., at the city of, in county and state of, I served the within summons [and complaint, *or* notice of object of action hereto annexed] on the above named defendant, C.... D...., by then and there delivering to him personally and

¹ Wis. Stats. 1898 secs. 2636, 2637 cf. Laws 1903 c. 190; Minn. Rev. Laws 1905 secs. 4106-4118; N. Dak. Rev. Codes sec. 5252; S. Dak. Rev. Code C. P. sec. 110; Cobbey's Ann. Stats. of Nebr. secs. 1070-1077.

² Wis. Stats. 1898 sec. 2635; Minn. Rev. Laws 1905 sec. 4104; N. Dak. Rev. Codes sec. 5253; S. Dak. Rev. Code C. P. sec. 111.

³ Wis. Stats. 1898 sec. 2642; Minn. Rev. Laws 1905 sec. 4114; N. Dak. Rev. Codes sec. 5262; S. Dak. Rev. Code C. P. sec. 115.

leaving with him a true copy of said summons [and complaint, *or* notice of object of action].

Dated, 19..

E.... F...., Sheriff.

[*In Wisconsin the following statement should be added to the foregoing certificate (Wis. Stats. 1898 sec. 2638a): and that at the time of said service I endorsed upon the copy of the summons so served the said date upon which the same was served and signed my name thereto and added thereto my official title.*]

131. Affidavit of personal service of summons by a person not an officer.

[*Title of court and of cause.*]

[*Venue.*]

E.... F...., being duly sworn says that on the day of, 19.., at the city of, in county and state of, he personally served the within summons [and complaint, *or*, notice of object of action] on the above named defendant,* C.... D...., by then and there delivering to him personally and leaving with him a true copy of said summons [and complaint, *or*, notice of object of action] ** and that he knew the person so served to be the person mentioned and described in said summons as defendant therein *** and that at the time of such service he endorsed upon the copy of the summons so served the said date upon which the same was served and signed his name thereto.

E.... F....

[*Jurat.*]

[*The last two clauses of this return with regard to knowledge by the affiant of the identity of the person served and endorsement upon the copy of the date of service are made necessary in Wisconsin by Wis. Stats. 1898 sec. 2638a and 2642, but are not necessary in the other states covered by this work.*]

132. Affidavit of service on infant defendant.⁴

[*Proceed as in Form 131 to **] C.... D...., who is a minor under the age of fourteen years, by delivering to and leaving with him the said C.... D.... a true copy of said summons [and complaint, *or* notice of object of action] and also by then and there delivering to and leaving with G.... H...., the father [*or* mother, *or* guardian] of said C.... D...., a true copy of said summons [and complaint, *or*, notice of object of action] and that

⁴ Wis. Stats. 1898 sec. 2636; Dak. Rev. Code C. P. sec. 110; Minn. Rev. Laws 1905 sec. 4106; Cobbeys Ann. Stats. of Nebr. sec. N. Dak. Rev. Codes sec. 5252; S. 1077.

he knew the person so served as defendant to be the person named in the said summons as defendant therein, and also knew the said G.... H.... to be the father [or, mother, or, guardian] of said infant defendant [conclude as in Form 131 from ***].

[In case the minor defendant has no father or mother or guardian within the state, that fact should be stated in the return and the return should also state that the copy of the summons was delivered to the person having the care and control of the minor or with whom he resides.]

133. Affidavit of service on defendant judicially declared to be incompetent.⁵

[Proceed as in Form 131 to *] C.... D...., who is a person judicially declared to be of unsound mind [or, incapable of conducting his own affairs in consequence of excessive drinking, or otherwise] and for whom a guardian has been appointed, by delivering to and leaving with him, the said C.... D...., personally a true copy of said summons [and complaint, or, notice of object of action] and also by delivering to and leaving with G.... H...., who is a duly appointed guardian of said defendant, a true copy of said summons [and complaint, or, notice of object of action] and that he knew the person so served as defendant to be the same person described in the said summons as defendant therein and knew the said G.... H.... so served to be the guardian of said defendant [conclude as in Form 131 from ***].

134. Affidavit of service on member of family, defendant not found.

[Proceed as in Form 131 to *] C.... D...., by leaving a true copy of said summons [and complaint, or, notice of object of action] at the usual place of abode of the said C.... D...., at, in said county, in the presence of E.... F...., who was and is one of the family of the said C.... D...., and of suitable age and discretion, and whom I informed of the contents thereof; and further that said defendant C.... D.... could not be found [conclude as in Form 131 from ***].

135. Affidavit of service on municipal corporation.⁶

[Proceed as in Form 131 to * and continue as follows] the town [or, city] of C.... D...., by then and there delivering to

⁵ Wis. Stats. 1898 sec. 2636;
Minn. Rev. Laws 1905 sec. 4106;
N. Dak. Rev. Codes sec. 5252; S.
Dak. Rev. Code C. P. sec. 110.

⁶ Wis. Stats. 1898 sec. 2637;
N. Dak. Rev. Codes sec. 5252 sub.
3; S. Dak. Rev. Code C. P. sec.
110 sub. 3.

and leaving with G.... H...., who is the chairman of said defendant town, and by then and there delivering to and leaving with J.... K...., who is the town clerk of the said defendant town [*or otherwise name the proper officer or officers upon whom service is required to be made by the statute*] a true copy of said summons [and complaint, *or*, notice of object of action] and that he knew the persons to whom he delivered the said summons [and complaint, *or*, notice of object of action] as aforesaid to be such officers as aforesaid of said defendant town [*or, city, or other municipal corporation*] [*conclude as in Form 131 from ****].

136. Affidavit of service on business corporation (Wis. Stats. 1898 sec. 2637 sub. 10 c. f. Laws of 1903 c. 190).

[*Proceed as in Form 131 to **] C.... D...., a corporation, by delivering to and leaving with E.... F...., who is the president [*or, vice-president, secretary, cashier, treasurer, director, or, managing agent*] of the said defendant corporation and who is known to this affiant to be such officer thereof, a true copy of the said summons [and complaint, *or*, notice of object of action] [*conclude as in Form 131 from ****].

[*In Wisconsin there are numerous provisions governing the service upon various different kinds of corporations, both domestic and foreign, contained in sec. 2637. It has not been deemed necessary to insert a separate form for each case specified in said section for the reason that the variation from the forms hereinbefore given can be easily made by reference to the statute, care being taken to insert all of the necessary facts to bring the case within the particular provision.*]

137. Sheriff's return of personal service of original notice (Iowa Code secs. 3518, 3519).

[*Venue.*]

I hereby certify that I received the within [*or, annexed*] original notice for service on the day of, 19.., and that on the day of, 19.., at township in said county I served the said notice personally on A.... B...., the defendant named in said notice, by reading the same to him [*or, by offering to read the same to him, he refusing to hear it read*] and by delivering to him personally a copy of the said notice [*or, by offering to deliver to him a copy of said notice, he refusing to receive the same*].

Dated, 19..

E.... F....,
Sheriff of County, Ia.

138. Affidavit of service by one not an officer.

[Venue.]

E.... F...., being duly sworn says that he received the within [or, annexed] original notice for service on the day of, 19.., [*here proceed as in Form 137*].

E.... F....

[Jurat.]

139. Affidavit to allow service of original notice on Sunday (Iowa Code sec. 3522).

[Venue.]

A.... B.... being duly sworn says that he is the plaintiff named in the within original notice; that C... ..D...., the defendant named in said notice, is about to remove from the state, and that personal service of such notice upon him will not be possible unless such service be made upon this Sunday, the day of, 19.., [*or state other fact or facts showing that personal service cannot be made unless made on Sunday*].

A.... B....

[Jurat.]

140. Return of service of original notice on member of family (Iowa Code sec. 3518).

[Venue.]

I, E.... F...., sheriff of county, Iowa, hereby certify that I received the within [or, annexed] original notice to serve on the day of, 19.., and that on the day of, 19.., I served the same on C.... D...., the defendant named therein, by leaving a copy of said notice at the dwelling house of said defendant at township, in said county, that being his usual place of residence, with G.... H...., a son [*or, wife, as the case may be*] of the said defendant, the said G.... H.... being a member of the defendant's family over the age of fourteen years, and the said defendant C.... D.... not being found in county.

Dated, 19..

J.... K....,

Sheriff of County, Ia.

141. Admission of personal service by defendant, endorsed on summons.⁷

I, C.... D...., the defendant in the within entitled action, herewith admit and acknowledge due and personal service upon

⁷ Wis. Stats. 1898 sec. 2642; Iowa Code sec. 3518; N. Dak. Minn. Rev. Laws 1905 sec. 4114; Rev. Codes sec. 5262; S. Dak.

me of the within summons [*in Iowa*, original notice], together with the annexed complaint [*or*, notice of object of action] at the city of, state of, this day of, 19..

C.... D....

Defendant.

142. Affidavit for publication of summons, defendant non-resident or residence unknown, or a foreign corporation (Wis. Stats. 1898 sec. 2639 sub. 1).⁸

[*Title of cause.*]

[*Venue.*]

A.... B.... being duly sworn says that he is the plaintiff above named [*or*, that he is the attorney for the plaintiff above named] and makes this affidavit on his own [*or*, said plaintiff's] behalf; that the above entitled action has been commenced by the issuance of a summons therein, of which a copy is hereunto annexed; that the plaintiff's complaint herein is duly verified, and has been filed with the clerk of the court of county;⁹ and that a copy thereof is hereto attached; that a cause of action exists in favor of the plaintiff against said defendant C.... D.... [*or*, that this action relates to real estate within this state and that defendant C.... D.... is a necessary [*or*, proper,] party to said action as fully appears by said complaint;* that said defendant C.... D.... is a non-resident of the state of Wisconsin [*or*, that said defendant's residence is unknown, *or*, that said defendant C.... D.... is a foreign corporation organized and existing under the laws of the state of] ** and that said plaintiff is unable, with due diligence, to make service of the summons in said action upon the said defendant; that the said defendant cannot be found within the state of Wisconsin, although diligent effort to find him and serve upon him the said summons has been made, as appears by the return of the sheriff of county endorsed upon said summons [*or*, by the affidavit of the sheriff of county hereto attached]; that the said defendant's post office address is, state of, and that said defendant's residence is, state of [*or*, that the said plaintiff is unable to ascertain either the post office address or the residence of said defendant, although the said plaintiff has made due and diligent effort to

Rev. Code C. P. sec. 115; Cob-bey's Ann. Stats. of Nebr. sec. 1073.

⁸ The order of publication must be made within ten days after the date of this affidavit. Wis. Stats.

1898 sec. 2640 as amended by Laws 1905 c. 16.

⁹ The complaint must be verified and filed before the order is made. Wis. Stats. 1898 sec. 2640 as amended by Laws 1905 c. 16.

ascertain them]; *** that said defendant has property within the state of Wisconsin, to-wit [*here briefly describe the property*] [*or, that the cause of action set out in said plaintiff's complaint herein arose within the state of Wisconsin, and that the above entitled court has jurisdiction of the subject of said action*].

A.... B....

[*Jurat.*]

143. The same, defendant absconding or concealed (Wis. Stats. 1898 sec. 2639 sub. 2).

[*Proceed as in Form 142 to * and insert between * and ** as follows*]: that said defendant is a resident of the state of Wisconsin and has departed from the said state of Wisconsin with intent to defraud his creditors [*or, with intent to avoid the service of a summons; or, that said defendant keeps himself concealed within the state of Wisconsin, with intent to defraud his creditors, or, with intent to avoid the service of a summons*]; [*continue as in Form 142 after ** down to ***, and omit the allegations after ****].

A.... B....

[*Jurat.*]

144. The same, defendant claiming interest in property (Wis. Stats. 1898 sec. 2639 sub. 3).

[*Between * and ** in Form 143 insert*]: that the subject of said action is real [*or, personal*] property in the state of Wisconsin, to-wit, [*here describe the property as in complaint*]; that said defendant has or claims a lien or interest, actual or contingent, in said property, as follows [*here state the nature of the interest claimed*] [*or, that the relief demanded by the plaintiff in said action consists wholly [or, partially] in excluding said defendant from any lien or interest in said property*]; [*continue as in Form 142 after **, omitting the allegations after ****].

A.... B...

[*Jurat.*]

145. The same, in foreclosure of mortgage or lien (Wis. Stats. 1898 sec. 2639 sub. 4).

[*Between * and *** in Form 142 insert*]: that said action is brought to foreclose [*or, redeem from, or, satisfy*] a mortgage upon real property situate in county, in the state of Wisconsin, executed by E.... F.... and recorded in the office of the register of deeds of county, in the state of Wisconsin, in volume of mortgages, upon page; that there is now due upon said mortgage, and the debt secured thereby

the sum of dollars, and upwards; [*or otherwise describe the claim or lien which the action is founded upon*].

[*Omit the allegations following *** in Form 142 and insert in place thereof*]: that the said defendant C.... D.... has or claims to have an interest or lien by [*here describe nature of lien*] upon the premises described in said mortgage, which accrued subsequent to the mortgage of said plaintiff; and that the relief demanded in this action consists partially in excluding and foreclosing the said defendant of and from all lien or interest in said mortgaged premises, and that said defendant is a necessary [*or, proper*] party to this action.

A.... B....

[*Jurat.*]

146. Same, in divorce (Wis. Stats. 1898 sec. 2639 sub. 5).

[*Between * and ** insert*]: that this action is brought by the plaintiff to obtain a divorce from the defendant for one of the causes prescribed by law as fully appears in the said complaint; [*omit the allegations of Form 142 following ****].

147. The same, against private corporation without officers (Wis. Stats. 1898 sec. 2639 sub. 6).

[*Between * and ** of Form 142 insert*]: that the said defendant is a private corporation organized under the laws of this state, and that the proper officers upon whom to make service of the summons in this action do not exist [*or, cannot be found*]; that the plaintiff has made [*or, caused to be made*] diligent inquiry and effort to find the president, or chief officer, vice-president, secretary, or cashier, treasurer, director or managing agent of said corporation, in order to make service of said summons upon him, and that no such officer or agent exists [*or, that no such officer or agent can be found*]; that the plaintiff has also made diligent effort to find the general office of said corporation or the place where its books are kept within this state and has been unable to find any such office, and upon information and belief states that said defendant has no such office within this state.

[*Omit the allegations of Form 142 after ***.*]

A.... B....

[*Jurat.*]

148. The same, defendants unknown (Wis. Stats. 1898 sec. 2639).

[*Between * and ** of Form 142 insert*]: that the subject of this action as more fully appears from the said complaint on file is certain real [*or, personal*] property situated within this

state, described as follows [here insert description of the property] and that certain persons, whose names are unknown to this plaintiff, and who are described in the title to this affidavit as unknown defendants, either have or claim to have some lien or interest, actual or contingent, in the said property, which lien or interest is subject to the claims of the plaintiff herein, and the relief demanded in this action consists wholly or partially in excluding such unknown defendants from any lien or interest in said property; that the said plaintiff has been unable to make service of the summons in this action upon the said unknown defendants, although due diligent effort has been made to that end, and that the said unknown defendant cannot be found within the state of Wisconsin, and that the said plaintiff has been unable to ascertain either the post-office address or the residence of said unknown defendants, although the said plaintiff has made due and diligent effort to ascertain the same.

A.... B....

[*Jurat.*]

149. Supporting affidavit of sheriff to accompany the foregoing (Wisconsin)

[*Title of action.*]

[*Venue.*]

G.... H.... being first duly sworn says that he is the sheriff of county; that the summons in the above entitled action was delivered to him for service on the day of, 19...; that he has used due diligence to find the said defendants and make service of said summons upon them, but is unable with due diligence used for that purpose to find the defendants C.... D.... and E.... F.... or either of them in this state, and that he is informed and verily believes that said defendants C.... D.... and E.... F.... are not residents of nor now in this state, but at present residing and being in the city of, in the state of

G.... H....

[*Jurat.*]

150. Order of publication, defendant foreign corporation (Wis. Stats. 1898 sec. 2639 sub. 1, and sec. 2640 as amended by Laws 1905 c. 16)

[*Title of cause.*]

It appearing to my satisfaction, from the affidavits of the plaintiff above named and of G.... H...., the sheriff of said county, as well as from the verified complaint of the plaintiff on file in this action, that the above entitled action has been com-

menced and is now pending; that the plaintiff's complaint herein is duly verified and has been filed with the clerk of the court of county; that a cause of action exists in favor of the above named plaintiff and against the above named defendant E.... F...., as fully set forth in said complaint, the grounds of which are [*here state the substance of the cause of action*] * [*or, that the defendant E.... F.... is a necessary, or, proper, party to the said action, which relates to real estate in this state*] ** and that said defendant E.... F.... is a foreign corporation organized under the laws of the state of, having its home office and place of business at, in said state of, and that L.... M...., who resides at, in said state of, is the president of said defendant; that said defendant E.... F.... has property within this state, viz: [*here describe the property*] [*or, that the cause of action set out in said plaintiff's complaint arose within this state and that the above named court has jurisdiction of the subject of said action*]; *** and that the said plaintiff is unable with due diligence to make service of the summons in said action upon the said defendant; that the said defendant cannot be found within the state of Wisconsin, although diligent effort to that end has been made, and that said defendant's post-office address is, state of, and said defendant's residence is, state of, [*or, that the plaintiff is unable, after due diligence, to ascertain either the post-office address or the residence of said defendant, although said plaintiff has made diligent effort to ascertain them*]; and on motion of G.... H...., attorney of said plaintiff,

IT IS HEREBY ORDERED that service of the summons in said action upon the said defendant be made by the publication thereof in the X.... Y.... Z...., a newspaper published in the city of, county of, and state of Wisconsin, which said newspaper is hereby designated as most likely to give notice to the said defendant, once a week for six weeks, and that the first publication of said summons be made within three months from the date of this order, and that on or before the day of the first publication of said summons the said plaintiff shall deposit in the post-office of, county of and state of Wisconsin a copy of said summons, together with a copy of the complaint [*or, notice of object of action*] in said action, securely enclosed in an envelope, the postage thereon duly prepaid, addressed to the said defendant at post-office, in the county of and state of [*or, that the deposit of a copy of the summons in said action, together with a copy of the complaint (or, notice of object of action) in said action in the post-office*

may be omitted, for the reason that the said defendant's post-office address cannot be ascertained].

It is hereby further ordered that at the option of the said plaintiff a copy of said summons, and a copy of said complaint [*or*, notice of object of action] be delivered to the said defendant personally, without the state of Wisconsin, which delivery shall have the same effect as completed publication and mailing thereof.

Dated, 19..

J.... K...., Circuit Judge.
[*or*, County Judge,
or, Court Commissioner].

151. The same, defendant non-resident or residence unknown (Wis. Stats. 1898 sec. 2639 sub. 1 and sec. 2640 as amended by Laws 1905 c. 16).

[*Proceed as in Form 150 and between ** and *** insert*]: that said defendant E.... F.... is not a resident of the state of Wisconsin [*or*, that the residence of said defendant E.... F.... is unknown] and that said defendant has property within this state, viz: [*here describe the property*] [*or*, that the cause of action set out in the said plaintiff's complaint arose within this state, and that the above named court has jurisdiction of the subject of said action].

152. The same, defendant absconded or concealed (Wis. Stats. 1898 sec. 2639 sub. 2 and sec. 2640 as amended by Laws 1905 c. 16).

[*Proceed as in Form 150 and between * and *** insert*]: that the said defendant E.... F.... is a resident of the state of Wisconsin and has departed from the said state of Wisconsin with intent to defraud his creditors [*or*, with intent to avoid the service of summons] [*or*, that said defendant E.... F.... keeps himself concealed within the state of Wisconsin with intent to defraud his creditors] [*or*, with intent to avoid the service of summons].

153. The same, defendant claiming interest in property (Wis. Stats. 1898 sec. 2639 sub. 3 and sec. 2640 as amended by Laws 1905 c. 16).

[*Proceed as in Form 150 and between * and *** insert*]: that the subject of this action is real [*or*, personal] property within this state, viz: [*insert description of property*], and that said defendant E.... F.... has or claims a lien or interest actual or contingent, in said property, as follows [*here describe the*

nature of the lien claimed] [*or*, that the relief demanded by the plaintiff in this action consists wholly [*or*, partially] in excluding said defendant E.... F.... from any lien or interest in said premises].

154. The same, in foreclosure (Wis. Stats. 1898 sec. 2639 sub. 4 and sec. 2640 as amended by Laws 1905 c. 16).

[*Proceed as in Form 150 and between * and *** insert*]: that said action is brought to foreclose [*or*, redeem from, *or*, satisfy] a mortgage upon said real estate situated in county, state of Wisconsin, executed by O.... P.... to Q.... R.... and recorded in the office of the register of deeds of county, in said state, in volume of mortgages on page, upon which mortgage there is now due the sum of dollars, with interest from, 19..; that said defendant E.... F.... either has or claims to have an interest in or lien upon the premises described in said mortgage, which interest or lien is subsequent to the mortgage of said plaintiff; and that the relief demanded in this action consists partially in excluding the said defendant E.... F.... from all lien or interest in said mortgaged premises, and that the said defendant E.... F.... is a proper party to this action.

155. The same, action to foreclose lien other than mortgage (Wis. Stats. 1898 sec. 2639 sub. 4 and sec. 2640 as amended by Laws 1905 c. 16).

[*Proceed as in Form 150 and between * and *** insert*]: that the said action was brought to foreclose [*or*, redeem from, *or*, satisfy] a certain claim or lien upon certain real property situated in the county of, in said state of Wisconsin, described as follows [*insert description of property*]; that the said claim or lien is of the following description [*here insert concise statement of the lien claimed*] and that there is now due on said lien the sum of dollars; that said defendant has or claims to have an interest in or lien upon the premises described, which interest or lien is subsequent to the lien of said plaintiff, and that the relief demanded in this action consists partially in excluding the said defendant E.... F.... from all lien or interest in said premises, and that the said defendant E.... F.... is a proper party to this action.

156. The same, in divorce.

[*Proceed as in Form 150 and between * and *** insert*]: that this action is brought for the purpose of obtaining a divorce in one of the cases authorized by law.

157. The same, defendant a domestic corporation without proper officers (Wis. Stats. 1898 sec. 2639 sub. 6 and sec. 2640 as amended by Laws 1905 c. 16).

[*Proceed as in Form 150 and between * and *** insert*]: that the said defendant is a private corporation organized and existing under and by virtue of the laws of this state, and that the proper officers of said corporation upon whom service of the summons in this action as authorized by law is to be made do not exist [*or, cannot be found*] although diligent effort and inquiry has been made to find the said officers and to serve the summons in this action upon them.

158. The same, unknown defendants.

[*Proceed as in Form 150 and between * and *** insert*]: that the subject of this action is real [*or, personal*] property situated within this state, described as follows [*here insert description of property*] and that such persons who are unknown to the plaintiff and who are named in the title to this action as unknown defendants either have or claim to have some lien, actual or contingent, in said property, and that the relief demanded in this action consists either wholly or partially in excluding such defendant or defendants from any lien or interest therein.

159. Affidavit of mailing (Wis. Stats. 1898 secs. 2642, 2821).

[*Title of court and of cause.*]

[*Venue.*]

G.... H.... being first duly sworn says that he is [the principal clerk in the law office of Q.... Z....] the attorney for the plaintiff in the above entitled action, and that on the.... day of, 19.., he deposited in the post-office at, in said county, and left there to be carried, a copy of the summons together with a copy of the complaint [*or, notice of object of action*] in the above entitled action, copies of which are hereto annexed, securely enclosed in an envelope, the postage duly prepaid, addressed to each of the defendants herein-after named, respectively, at his postoffice address, as stated below, that is to say: C.... D.... at, State of; E.... F.... at, state of, one set of said copies of summons and complaint to each, without any directions to the postal officers upon the wrapper for the return thereof in case of non-delivery to the person addressed. G.... H....

[*Jurat.*]

[*Double time must be given if service is by mail. Wis. Stats. 1898 sec. 2822.*]

160. Affidavit of publication (Wisconsin).[*Title of court and of cause.*][*Venue.*]

L.... M.... being first duly sworn says that he is the printer [or, foreman of the printer, or, publisher, or, principal clerk of the printer] of the [name of newspaper], a newspaper published at, in county, and state of

That the summons, of which a printed copy is hereto annexed, was published in said newspaper once in each week for six weeks, and the date of the first publication was the day of, 19.., and the date of the last publication was the day of, 19..

L.... M....

[*Jurat.*]**161. Affidavit of service without the state (Wisconsin).**[*Title of court and of cause.*][*Venue.*]

N.... O.... being first duly sworn says that he is the deputy sheriff of the county of, in the state of [or, state occupation], and that on the day of, 19.., at the city of, county of and state of, he personally served the summons and complaint [or, notice of object of action] in the above entitled action, of which a copy is hereto annexed, on the above named defendants, by delivering to and leaving with each of said defendants personally a true copy of said summons, and thereto annexed a copy of said complaint [or, notice of object of action]; and that he knew the persons and each of them so served to be the persons mentioned and described in said summons as defendants in the above entitled action; and that at the time of the said service he endorsed upon each copy of the summons so served and delivered to said defendants the date upon which the same was so served, and signed his name thereto [if an officer add, and that to said signature he added his official title].

N.... O....

[*Jurat.*]**162. Affidavit for publication, defendant non-resident and not found (Minn. Rev. Laws 1905 secs. 4111, 4112).**[*Caption as in Form 5.*][*Venue.*]

A.... B.... being duly sworn, deposes and says that he is the plaintiff [or, the agent or attorney] in the above entitled action, and that affiant believes that the defendant C.... D.... * is not a resident of the state of Minnesota, and cannot be found therein ** and that his place of residence is at the city of, county of and state of: that affiant has deposited

a copy of the summons in said action in the post-office in the of, in said county of and state of Minnesota, properly enclosed in an envelope with the postage prepaid thereon, and directed to the said defendant C. . . . D. . . . at his said place of residence ***; that the defendant C. . . . D. . . . has property within this state, to-wit [*describe the property*] and that this court has jurisdiction of the subject of this action;

Or: that this action is brought by the plaintiff to obtain a divorce in one of the cases prescribed by law;

Or: that the subject of this action is real [*or, personal*] property in this state [*describe the same*] and that the defendant C. . . . D. . . . has or claims a lien or interest, actual or contingent, therein, and the relief demanded consists wholly or partially in excluding the said defendant C. . . . D. . . . from any interest or lien therein;

Or: that this action is brought to foreclose a certain mortgage upon real estate in the county of in this state, executed by [*describe mortgage and place of record*] [*or, to foreclose a certain mechanic's lien upon real estate in the county of, in this state* [*describe lien and property covered thereby*], and the defendant C. . . . D. . . . is a necessary [*or, proper*] party to said action.

A. . . . B. . . .

[*Jurat.*]

163. The same, residence of defendant unknown (Minnesota).

[*Proceed as in Form 162 and substitute between ** and ****]: that the place of residence of said defendant C. . . . D. . . . is not known to the affiant, although he has made diligent effort to ascertain the same.

164. The same, defendant foreign corporation (Minnesota).

[*Proceed as in Form 162, but substitute between ** and ****]: and that defendant C. . . . D. . . . is a foreign corporation organized and existing under the laws of the state of, with its office and place of business in the city of, in the said state of, which is its place of residence, and that affiant has deposited a copy of the summons in this action in the post-office in the of, in said county of and state of Minnesota, properly enclosed in an envelope with the postage thereon prepaid, and directed to the said defendant corporation at its said residence, to wit, the city of in the said state of; that said defendant has property within the state, to-wit: [*insert description of property*].

165. The same, defendant absconding or concealing himself (Minnesota).

[*Proceed as in Form 162, but substitute between * and ****]: is a resident of this state, but has departed therefrom with intent to defraud his creditors, [or, to avoid the service of a summons, or, keeps himself concealed within this state with intent to defraud his creditors, or, to avoid the service of a summons] and that his present place of residence is unknown to and cannot be ascertained by defendant [or, if his residence be known, state where it is and that a copy of the summons has been deposited in the postoffice, addressed to such place of residence, as in preceding forms].

166. Affidavit for service by publication (Iowa Code sec. 3534).

[*Title of court and cause.*]

[*Venue.*]

A.... B.... being duly sworn says he is the plaintiff [or, attorney for the plaintiff] in the above entitled action, and that personal service of the original notice in this action cannot be made upon the defendant C.... D.... within this state, although due and diligent effort to make such service has been made.

A.... B....

[*Jurat.*]

167. Affidavit for publication of summons (South Dakota; S. Dak. Rev. Code C. P. sec. 112).

[*Title of court and of cause.*]

[*Venue.*]

A.... B.... being duly sworn says that he is the plaintiff [or, attorney for the plaintiff] in this action; that the above named defendant C.... D.... cannot be found within this state, although the plaintiff has made due and diligent effort to find said defendant [*here set forth the efforts used, as*] by repeatedly visiting the various places which said defendant was accustomed to frequent and particularly [*specify times and places*]; that on numerous occasions, and particularly [*state times*], deponent called at the said defendant's residence [or, lodgings] but was unable to find said defendant and was told by the persons in charge of said residence [to-wit: his wife, or, son] that defendant was not at home, and that it was not known when he would be at home [or otherwise state the efforts used to find the defendant, so that the court or officer may see

that due diligence has been used]¹⁰; that the summons in this action was placed in the hands of the sheriff of said county for service, but was returned by the said sheriff with his endorsement thereon; that said defendant, after due diligence, could not be found within the state of South Dakota; that a cause of action exists in favor of the plaintiff against said defendant C.... D.... for the purpose of foreclosing a mortgage upon certain real property within this state [*describing the same*] [*or, for the purpose of obtaining a divorce in one of the cases authorized by law, or otherwise state briefly the cause of action*], as more fully appears from the complaint herein, a copy of which is hereto attached and made a part of this affidavit].

Or: That this action relates to real property within this state, to-wit: [*describe the same*] and is brought for the purpose of [*here state briefly the object of the action*] and that the defendant C.... D.... is a proper party to said action, as more fully appears in the complaint of the plaintiff, a copy of which is hereto attached and made a part of this affidavit.

That the affiant is informed and believes that the said defendant C.... D.... resides at, in [*or, that the place of residence of said C.... D.... is neither known to the plaintiff nor can with reasonable diligence be ascertained by him*];

That the defendant C.... D.... is a foreign corporation organized and existing under the laws of the state of and has property within this state; [*or, that the said cause of action arose in this state*]; *or*, that the defendant C.... D.... is a resident of this state and has departed therefrom with intent to defraud his creditors, *or*, to avoid the service of summons, *or*, keeps himself concealed within this state with intent to defraud his creditors, *or*, to avoid the service of a summons, *or*, that the defendant C.... D.... is not a resident of this state, but has property therein, and this court has jurisdiction of the subject of the action; *or*, that the subject of this action is real [*or, personal*] property in this state and the defendant C.... D.... has or claims a lien or interest, actual or contingent, therein, *or*, the relief demanded herein consists wholly or partly, in excluding the defendant C.... D.... from any interest or lien therein.

E.... F....
Circuit Judge.

[*Jurat.*]

¹⁰ An affidavit which simply states that the defendant cannot after due diligence be found within the state is insufficient, because

it states a conclusion and not a fact. The facts showing what effort has been made to find the defendant must be stated in the

168. Supporting affidavit by sheriff (S. Dak. Rev. Code C. P. sec. 112).[*Title of court and cause.*][*Venue.*]

J.... K.... being duly sworn says that he is the sheriff of the county of, in the state of South Dakota; that on the day of, 19.., deponent received from the plaintiff's attorney a summons in this action for service upon the defendants therein named; that deponent has made due and diligent effort to serve the same upon the defendant C.... D.... by frequently endeavoring to find the said defendant and by visiting the various places which the said defendant was accustomed to frequent, and particularly [*here specify places and time*]; that on numerous occasions after receiving said summons, and particularly on the day of, 19.. [*specify other times, if any*], deponent called at the defendant's residence [*or, lodgings*] but was unable to find the defendant and was informed by the person in charge, to-wit: [*the defendant's wife, or, his son*] that it was not known when the defendant would be at home, and that deponent has been unable by diligent inquiry to ascertain when said defendant would be at home.

[*Or, where defendant has absconded or is concealed*]: That deponent has been unable to ascertain the present whereabouts of the defendant C.... D...., although he has made diligent inquiry therefor of the wife and family of the defendant at his residence, to-wit, on the day of, 19.. [*and name other occasions, if any*], and of L.... M...., in whose employ the defendant C.... D.... was when last seen, and deponent believes from his said inquiries so made that the said C.... D.... has either absconded from this state or is keeping himself concealed therein for the purpose of avoiding service of the summons in this action.

J.... K....

[*Jurat.*]**169. Order of publication (S. Dak. Rev. Code C. P. sec. 112).**[*Title of court and of cause.*]

It satisfactorily appearing, by the annexed affidavits of A.... B.... and E.... F.... that the defendant C.... D.... cannot after due diligence be found within this state, and that a cause of action exists in favor of said plaintiff against said defendant C.... D.... [for the purpose of foreclosing a mortgage upon

affidavit, in order that the court may judicially determine whether proper diligence has been used.

Bothell v. Hoellwarth, 10 S. Dak. 491 s.c. 74 N. W. 231.

certain real property within this state, as described in said affidavit] [*or, for the purpose of obtaining a divorce in one of the cases authorized by law, or otherwise state briefly the cause of action*] as more fully appears from the complaint herein, a copy of which is hereto attached;

Or: that this action relates to real property within this state, to-wit, [*describe the same*] and is brought for the purpose of [*here state briefly the object of the action*] and that the defendant C.... D.... is a proper party to said action, as more fully appears in the complaint of the plaintiff, a copy of which is hereto attached, and that the defendant C.... D.... is a foreign corporation organized and existing under the laws of the state of, and has property within this state; [*or, that the said cause of action arose in this state; or, that the defendant C.... D.... is a resident of this state and has departed therefrom with intent to defraud his creditors, or, to avoid the service of summons, or, keeps himself concealed within this state with intent to defraud his creditors, or, to avoid the service of a summons; or, that the defendant C.... D.... is not a resident of this state but has property therein and this court has jurisdiction of the subject of the action, or, that the subject of this action is real (or, personal) property in this state and the defendant C.... D.... has or claims a lien or interest, actual or contingent, therein, or, that the relief demanded herein consists wholly or partly in excluding the defendant C.... D.... from any interest or lien therein*];

And it further appearing that the place of residence of the said defendant C.... D.... is at the city of, state of [*or, that the residence of said C.... D.... is neither known to said plaintiff nor can with reasonable diligence be ascertained by him*];

On motion of G.... H...., attorney for the said plaintiff,

ORDERED that service be made upon said defendant C.... D.... by the publication of the summons, of which a copy is hereto attached, in the X.... Y.... Z...., a newspaper printed and published in, the same being hereby designated as most likely to give notice to said defendant, once a week for successive weeks.

And further ordered and directed that a copy of the summons and complaint be forthwith deposited in the postoffice, securely enclosed and directed to the said defendant C.... D.... at his place of residence, and postage thereon paid [*this clause to be omitted in case the defendant's residence is unknown*].

Dated, 19..

N.... O....
Circuit Judge.

170. Affidavit for publication against unknown defendants, in foreclosure (S. Dak. Rev. Code C. P. sec. 112).

[*Title of court and of cause.*]

[*Venue.*]

A.... B.... being duly sworn says that he is the plaintiff [*or, the attorney for the plaintiff*] in this action; that this action is brought for the purpose of foreclosing a certain mortgage upon real estate within this state, described as follows: [*describe the same*] as more fully appears from the complaint herein, a copy of which is hereto attached and made a part of this affidavit; that certain persons, who are described in the title to this action as unknown claimants, have some interest in or lien upon the said mortgaged premises, which interest or lien is subject to the plaintiff's said mortgage thereon, the said unknown claimants being the heirs at law of one E.... F...., who purchased the said premises and took title thereto subject to the plaintiff's mortgage [*or otherwise state generally what relation the unknown defendants bear to the litigation*]; that the names and residences of said unknown claimants are unknown to the plaintiff and cannot with reasonable diligence be ascertained by him, although deponent has made diligent effort to ascertain the same.

WHEREFORE the deponent prays for an order that the summons herein be served by publication on such unknown claimants.

A.... B....

[*Jurat.*]

171. Order for publication against unknown defendants in foreclosure (S. Dak. Rev. Code C. P. sec. 112).

[*Title of court and of cause.*]

It satisfactorily appearing, by the affidavit of A.... B...., hereto annexed, that this action is brought for the purpose of foreclosing a mortgage upon certain real estate within this state, described in said affidavit, and that certain persons named in the title hereto as unknown claimants have some interest in or lien upon the said mortgaged premises, and that the said persons are unknown to the plaintiff, and that the plaintiff cannot with reasonable diligence ascertain the residence of said persons or either of them; on motion of G.... H...., attorney for the said plaintiff,

IT IS ORDERED that service be made upon the said unknown claimants by publication of the summons herein in the X.... Y.... Z...., a newspaper printed and published in, once a week for successive weeks.

Dated, 19..

I.... K....
Circuit Judge.

172. Affidavit for publication (Nebraska; Cobby's Ann. Stats. of Nebr. sec. 1079).

[Caption as in Form 6.]

[Venue.]

A.... B.... being first duly sworn says that he is the plaintiff [or, the attorney for the plaintiff] in the above entitled action; that this action is one of those mentioned in section seventy-seven (77) of the Code of Civil Procedure of this state; that on the day of, 19.., the plaintiff filed in said court a petition against the defendants above named, and that the object of this action is to recover possession of certain real property in this state described as follows [*insert description*] [or, to obtain partition of certain real property in this state, *describing same*, or, to foreclose a certain mortgage upon real property within this state, *describing same*, and obtain sale thereof, or otherwise briefly state the object of the action, so as to show it is one of the actions named in section 77 of Code of Civil Procedure] as more particularly set forth in said petition on file.¹¹ That the defendant C.... D.... is a non-resident of this state [or, is a foreign corporation organized and existing under the laws of the state of] and has property in this state [or, debts owing to him within this state] which property [or, debts] are sought to be appropriated in this action by attachment [or, garnishment, or other provisional remedy];

Or: That the defendant C.... D.... is a non-resident of this state [or, is a foreign corporation organized and existing under the laws of the state of] and claims the title to or some lien or other interest against or in said property, and the relief demanded in the above entitled action consists, wholly or partially, in excluding said defendant C.... D.... from any interest therein;

Or: That the defendant C.... D.... is a resident of the county of in this state, and has departed from this state [or, from said county of] with intent to delay and defraud his creditors [or, to avoid the service of a summons herein], or, keeps himself concealed within this state with intent to delay and defraud his creditors, or, to avoid the service of the summons herein.

Affiant further says that service of summons cannot be made on said defendant within this state, and that this affidavit is made for the purpose of procuring service on said defendant by publication.

A.... B....

[*Jurat.*]

¹¹ It is not necessary that the affidavit shall state the cause of action fully, as that is contained in the petition. It is sufficient if

173. Notice to be published, defendant not found (Nebraska).[*Title of court and of cause.*]

To the above named defendant C.... D...., a non-resident
[or, a foreign corporation, or, not found]:

You are hereby notified that on the day of, 19.., A.... B...., the plaintiff herein, filed his petition in this action in the district court of county, Nebraska, against the above named defendants, the object and prayer of which is to foreclose a certain mortgage executed on the day of, 19.., by one L.... M.... upon certain real estate described as follows [*insert description*] to secure payment of the sum of dollars, with interest at, &c., upon which mortgage there is now due the sum of dollars with interest, &c., for which sum plaintiff prays for a decree that the defendant pay the same, and that in default of such payment said premises may be sold to satisfy the amount found due [*or otherwise state intelligibly and concisely the object and prayer of the petition*].

You are required to answer said petition on or before the day of, 19..

Dated at, Nebraska, ..., 19..

A.... B...., Plaintiff,

By K.... M...., Attorney for Plaintiff.

174. Affidavit for publication, unknown heirs (Nebraska; Cobbe's Ann. Stats. of Nebr. sec. 1084).[*Title of court and of cause.*][*Venue.*]

A.... B.... being first duly sworn says he is the plaintiff [*or, the attorney for the plaintiff*] in the above entitled action; that said action has been brought for the purpose of [*here state the purpose of the action, as for the foreclosure of a certain mortgage or otherwise*] as more fully appears from the petition in said action, which is annexed to this affidavit; that it is necessary in order that the plaintiff may obtain the relief demanded in the said petition that the heirs [*or, devisees*] of one C.... D...., now deceased, should be made parties defendant to the said action, and that the names of said heirs [*or, devisees*] and their respective residences are unknown to the plaintiff and cannot be ascertained by him, although he has made diligent effort to ascertain the same.

A.... B....

[*Jurat.*]

the affidavit shows that the nature or character of the suit is one in which the statute authorizes service by publication.

175. Order of publication on unknown heirs (Nebraska; Cob-bey's Ann. Stats. of Nebr. sec. 1084).

[*Title of court and of cause.*]

It satisfactorily appearing to the court, by the affidavit of A.... B...., annexed to the petition, in this action, and by the said petition, that it is necessary in this action that the heirs [*or*, devisees] of one C.... D...., now deceased, should be made defendants therein, and that the names of the said heirs [*or*, devisees] and their respective residences are unknown to the plaintiff and cannot be ascertained by him; now therefore, upon motion of E.... F...., plaintiff's attorney,

IT IS ORDERED that service be made upon the said unknown heirs of C.... D.... by the publication of the notice hereto attached, for a period of four consecutive weeks in the X.... Y.... Z...., a newspaper printed in the county of, state of Nebraska.

Dated, 19..

G.... H....
District Judge.

176. Notice to be published, unknown heirs (Nebraska; Cob-bey's Ann. Stats. of Nebr. sec. 1084).

[*This notice may be made to correspond to the last preceding notice, except that in enumerating parties defendant in the caption there should be added as defendants: the unknown heirs (or, devisees) of C.... D...., deceased; and the notice should be directed: to the unknown heirs (or, devisees) of C.... D...., a deceased person.*]

CHAPTER VIII.

ARREST AND BAIL.

- | | |
|--|---|
| <p>177. Affidavit for arrest in an action for injury to person.</p> <p>178. Affidavit for arrest in action to recover property obtained by false pretenses.</p> <p>179. Affidavit for arrest in an action for conversion.</p> <p>180. Affidavit for arrest in an action for embezzlement by an agent.</p> <p>181. Affidavit for arrest when debt was fraudulently contracted (North and South Dakota).</p> <p>182. Affidavit for arrest where defendant has disposed of his property with intent to defraud his creditors (North and South Dakota).</p> <p>183. Affidavit for arrest in an action where defendant is a non-resident, or is about to remove from the state Wisconsin and South Dakota).</p> <p>184. Affidavit for arrest in replevin, property concealed.</p> | <p>185. Affidavit of sheriff to accompany above.</p> <p>186. Undertaking for order of arrest.</p> <p>187. Plaintiff's affidavit to undertaking, if without surety, to accompany Form 186.</p> <p>188. Order of arrest.</p> <p>189. Undertaking to obtain discharge of defendant from arrest.</p> <p>190. Notice of exception to bail.</p> <p>191. Justification by bail, to be annexed to undertaking.</p> <p>192. Undertaking to obtain discharge from arrest in replevin.</p> <p>193. Sheriff's return of arrest.</p> <p>194. Sheriff's certificate of deposit in lieu of bail (Wisconsin).</p> <p>195. Clerk's certificate of deposit in lieu of bail.</p> <p>196. Affidavit on motion to vacate arrest.</p> <p>197. Notice of motion to vacate arrest or reduce bail.</p> <p>198. Order vacating arrest.</p> <p>199. Order reducing bail.</p> |
|--|---|

The provisional remedy by arrest in civil actions no longer exists in many of the states, and where it is still allowed it is confined to certain classes of actions which are generally tort actions. The constitutions of Wisconsin and South Dakota provide that there shall be no imprisonment for debt arising out of or founded on contract (Const. Wis. Art. I sec. 16; Const. S. Dak. Art. VI sec. 15.) The constitution of Minnesota provides that there shall be no imprisonment for debt, but that the legislature may provide for imprisonment of persons charged with fraud when contracting a debt (Const. Minn. Art. I sec. 12). The constitutions of Iowa and Nebraska provide that no person shall be imprisoned

for debt in any civil action except in case of fraud. (Const. Iowa Art. I sec. 19; Const. Nebr. Art. I sec. 20). The constitution of North Dakota provides that no person shall be imprisoned for debt unless upon refusal to deliver up his estate for the benefit of his creditors, or in cases of tort, or where there is a strong presumption of fraud (Const. N. Dak. Art. I sec. 15).

In the states of Minnesota, Iowa, and Nebraska there are no statutes authorizing arrest in civil actions. Such statutes, however, exist in the states of Wisconsin, North Dakota, and South Dakota. In all of the three last named states the defendant may be arrested in the following three classes of actions:

1. In an action for injuries to person, character or personal property, or the conversion of personal property.

2. In an action for money or property embezzled or fraudulently misapplied by a public officer or a private person acting in a fiduciary capacity.

3. In an action of replevin when the property in controversy has been concealed or disposed of with fraudulent intent.

In addition to these three classes of actions which are common to all of the last named states, arrest may be had in Wisconsin and South Dakota in any action not arising out of contract, where the defendant is a non-resident or is about to remove from the state; also in an action to recover a fine or penalty; in North Dakota and South Dakota, in an action upon a debt fraudulently contracted, or an action of deceit, or when the defendant has disposed of his property with intent to defraud his creditors or is about to do so; in Wisconsin, in an action for seduction, criminal conversation, or misconduct in any office or professional employment; in South Dakota, in an action on a promise to marry. (Wis. Stats. 1898 sec. 2689; N. Dak. Rev. Codes sec. 5304; S. Dak. Rev. Code C. P. sec. 157). In all of the states named it is provided that no female shall be arrested except for wilful injury to person, character or property. The procedure to obtain an order of arrest is substantially identical in the three states.

177. Affidavit for arrest in an action for injury to person.¹

[*Title of court and of cause.*]

[*Venue.*]

A.... B.... being duly sworn says that he is the plaintiff above named [*or, the attorney for the plaintiff and makes this affidavit on his behalf*]; that on the day of, 19..,

¹ If the statements of fact in this affidavit be not upon knowledge, but upon information and belief, the affidavit must set forth

the facts upon which the information and belief are founded. N. Dak. Rev. Codes sec. 5306; S. Dak. Rev. Code C. P. sec. 159.

* at the city of, in said county, C. . . . D. . . ., the defendant above named, did wilfully make an assault upon, beat, wound, and injure the plaintiff, without cause, whereby the plaintiff has suffered great pain of body and mind, being for three weeks disabled from attending to his labors, and incurred great expense for care and medical attendance; and by reason thereof said plaintiff has a cause of action against said C. . . . D. . . . to recover damages in at least the sum of dollars; ** that said plaintiff is about to commence action therefor; and that he desires an order of arrest of said C. . . . D. . . . in said action.

A. . . . B. . . .

[*Jurat.*]

178. Affidavit for arrest in action to recover property obtained by false pretenses.

[*Proceed as in Form 177, and insert between * and ***]: at, in said county, the defendant C. . . . D. . . ., devising and intending to cheat and defraud plaintiff of his goods, money and property, did knowingly and falsely pretend to plaintiff that a certain written paper then and there produced by him, said defendant, and offered to plaintiff and given to him in payment for a certain horse before then agreed to be sold by the affiant to said defendant, was a good and valid promissory note for the payment of one hundred and fifty dollars, on the day of, 19. . ., and that the person purporting to be the maker thereof and responsible therefor, was in fact the maker thereof and responsible therefor, whereas in truth and in fact the said note was not a good and valid promissory note for the sum aforesaid, nor for any sum whatever, and the person purporting to be the maker thereof, to-wit, C. . . . D. . . ., was not the maker thereof, but the said note was forged and counterfeit, and all this the said defendant well knew; by means of which said false pretenses he, the said defendant, did then and there unlawfully and designedly obtain from the plaintiff one horse of the value of two hundred dollars, the property of the plaintiff, and with intent to defraud the affiant.

179. Affidavit for arrest in an action for conversion.

[*Proceed as in Form 177, and insert between * and ***]: at, in said county, the defendant, C. . . . D. . . ., unlawfully and wrongfully took the following described property of plaintiff, to-wit [*describe the property*], and wrongfully converted the

The same rule applies in the absence of statute, for the very plain reason that a court or judge will rarely grant so drastic a rem-

edy as an arrest of the person based merely upon allegations upon information and belief.

same to his own use, to the damage of this affiant dollars, the value of said property; by reason whereof plaintiff has a cause of action against said defendant to recover said sum as damages.

180. Affidavit for arrest in an action of embezzlement by an agent.

[*Proceed as in Form 177, inserting between * and ***]: the defendant, C.... D...., was the agent of this plaintiff, appointed and employed to conduct and carry on a certain business, to-wit, [*describe the business*]; that as such agent, and in the course of his employment as such, said defendant received large amounts of personal property, to-wit, [*describe property and give value*] and also large sums of money, amounting as near as affiant is able to ascertain to over and above the sum of dollars; and that on or about the day aforesaid, and at other times prior to the commencement of this action the said defendant unlawfully and fraudulently misapplied, embezzled and unlawfully converted to his own use, the said property and money above described, to the damage of this affiant dollars, for the recovery of which plaintiff has a cause of action against defendant.

181. Affidavit for arrest when debt was fraudulently contracted (North and South Dakota).

[*Proceed as in Form 177 inserting between * and ***]: plaintiff sold and delivered to defendant, at his request, certain goods, wares and merchandise, of the value of dollars; that prior to such sale and delivery, and for the purpose of inducing plaintiff to make the same, defendant falsely and fraudulently represented to plaintiff [*here state representations, as*] that he was solvent and able to meet all his debts and obligations, whereas in fact said defendant was at that time insolvent and unable to meet his obligations and knew himself to be insolvent; that plaintiff, relying on said representations and believing the same to be true, thereupon sold and delivered said goods, wares and merchandise to defendant, whereby the same were lost to the plaintiff and have never been paid for by defendant, and the plaintiff has suffered damage thereby in the sum of dollars, for which he has a cause of action against said C.... D....

182. Affidavit for arrest where defendant has disposed of his property with intent to defraud his creditors (North and South Dakota).

[*Proceed as in Form 177, and after stating the cause of action insert*]: and on or about the day of, 19.., the de-

defendant C.... D.... being the owner of a certain stock of goods and merchandise then situated in a certain store building in the city of, secretly removed the said property to some place outside of the limits of the state of with intent thereby to defraud his creditors. and that the said defendant, C.... D...., has no other property within the state of upon which execution can be levied [*or, state fully the facts showing that defendant has removed or is about to remove or dispose of his property, with intent to defraud his creditors*].

183. Affidavit for arrest in an action where defendant is a non-resident, or is about to remove from the state (Wisconsin and South Dakota).

[*Proceed as in Form 177 to the * and insert a statement of the cause of action showing that it is one not arising out of contract, and insert after the ** and before the final sentence*]: That said defendant is not a resident of this state [*and, if his residence is known, that he resides at, in the state of*]

Or: That the above named defendant is about to remove from this state [*here state facts sustaining allegation, e. g.*] that he has sold his house in and has taken a passage on board the, for, with family and his household goods [as the deponent is informed by M.... Z...., the brother of the defendant, and verily believes.]

184. Affidavit for arrest in replevin, property concealed.

[*Title of court and of cause.*]

[*Venue.*]

A.... B.... being first duly sworn says that he is the plaintiff in the above entitled action; that he is the owner of and lawfully entitled to the possession of the following described property, to-wit, [*describe same*]; that said property is wrongfully detained from plaintiff by the said defendant and that the alleged cause of detention thereof, according to affiant's best knowledge, information and belief, is the false and groundless claim of the defendant that he owns [*or, has a lien on*] the property which claim the plaintiff denies and is ready to disprove; that said property has not been taken for a tax, assessment or fine, pursuant to the statute, nor seized under an execution or attachment against the property of this plaintiff; that the actual value of said property is the sum of dollars; that on the day of, 19.., this plaintiff commenced this action, and on his affidavit setting forth the facts above stated, which affidavit is now on file herein, and on an undertaking duly made, as required by section 2720 of the revised statutes, and approved

by O.... P...., sheriff of said county, and now on file, reference thereto being hereby had, he required said sheriff to take the said property from said defendant and deliver the same to this plaintiff; that he is informed by said sheriff that said defendant has removed, concealed or disposed of said property so that the same cannot be found or taken by the sheriff; and the affiant therefore desires an order for the arrest of said defendant in this action.

A.... B....

[*Jurat.*]

185. Affidavit of sheriff to accompany above.

[*Title of court and of cause.*]

[*Venue.*]

E.... F.... being first duly sworn says that he is the sheriff of county; that he has read the foregoing affidavit of A.... B....; that on the day of, 19.., upon the requisition of said A.... B...., and due undertaking given and approved by affiant, he made search for and attempted to take the property described in the foregoing affidavit, but that the same could not be found after diligent search and inquiry, and that said defendant, C.... D...., refused to inform this affiant where the said property was, but told the affiant that he had concealed it to prevent the same being taken in this action.

E.... F....

[*Jurat.*]

186. Undertaking for order of arrest.

[*Title of court and of cause.*]

WHEREAS A.... B...., the above named plaintiff, is about to apply for an order for the arrest of C.... D...., the above named defendant in this action;

NOW, THEREFORE, we, A.... B...., the plaintiff, as principal, and E.... F.... and G.... H...., as sureties, all of, in said county, do hereby undertake that if the said A.... B...., defendant, recover judgment, the plaintiff will pay all costs that may be awarded to defendant, and all damages which he may sustain by reason of the arrest, not exceeding the sum of dollars.

Dated, 19..

A.... B....

E.... F....

G.... H....

187. Plaintiff's affidavit to undertaking, if without surety (to be added at the foot of Form 186).

[*Venue.*]

A.... B.... being first duly sworn says that he is the plaintiff in the above entitled action, and that he has signed the foregoing

undertaking, and that he is a resident and householder and freeholder in the county of within this state, and worth the sum of five hundred dollars, above all his debts and liabilities, and exclusive of all property exempt from execution by the laws of this state.

A.... B....

[*Jurat.*]

188. Order of arrest.

[*Title of court and of cause.*]

The State of to

the Sheriff of County.

GREETING: You are hereby required forthwith to arrest the above named defendant, C... D..., and hold him to bail in the sum of dollars, in the manner required by law, and to return this order to L... M..., attorney for the plaintiff, by whom this order is subscribed, at his office, in the city of, in said county, on the day of, 19..

Dated at, ..., 19..

J.... K....

Circuit Judge.

189. Undertaking to obtain discharge of defendant from arrest.

[*Title of court and of cause.*]

WHEREAS C.... D..., the above named defendant, has been arrested in this action by the order of the Hon. I.... K..., circuit judge, dated on the day of, 19..;

NOW, THEREFORE, we, E.... F..., merchant, and G.... H..., farmer, both of, in said county, do hereby undertake in the sum of one thousand dollars that the said defendant shall at all times render himself amenable to the process of the court during the pendency of the action, and to such as may be issued to enforce the judgment therein.

Dated at, ..., 19..

E.... F....

G.... H....

190. Notice of exception to bail.

[*Title of court and of cause.*]

To L.... M..., Esq.,

Sheriff of County.

Sir: Please take notice that the plaintiff does not accept the bail given by the defendant in this action upon his arrest.

Dated at, ..., 19..

N.... O....

Plaintiff's Attorney.

191. Justification by bail, to be annexed to undertaking.[*Venue.*]

E.... F.... and G.... H.... being each first duly sworn, each for himself says that he has signed the foregoing undertaking; that his residence and occupation are therein truly stated; that he is a resident and householder and freeholder within this state, and that he is worth the sum of one thousand dollars in property within this state, exclusive of property exempt from execution by the laws of this state.

E.... F....

G.... H....

[*Jurat.*]**192. Undertaking to obtain discharge from arrest in replevin.**[*Title of court and of cause.*]

WHEREAS the above entitled action has been brought by the above named plaintiff against the above named defendant, to recover the possession of the following personal property [*describing same*] which is alleged to be unjustly detained, the value of which property is stated in the affidavit of said plaintiff to be dollars;

And whereas C..... D....., the above named defendant, has been arrested in said action for the cause mentioned in the third subdivision of section 2689 of the Wisconsin Statutes of 1898 [*or, in North Dakota, the third subdivision of section 5304 of the Revised Codes of North Dakota, or, in South Dakota, the third subdivision of section 157 of the Revised Code of Civil Procedure of South Dakota*];

NOW, THEREFORE, we, E.... F...., of, county of and state of, merchant, and G.... H...., of, county of and state of mechanic, do hereby acknowledge ourselves bound in the sum of dollars [*this sum must be double the value of the property replevined*] for the delivery of said personal property to said plaintiff if such delivery be adjudged, and for the payment to him of such sum as may for any cause be recovered against said defendant.

Dated, 19..

E.... F....

G.... H....

[*Venue.*]

E.... F.... and G.... H.... being each duly sworn, each for himself says that he is the person of that name described in and who executed the foregoing undertaking; that he is a resident, householder and freeholder within the state of and

is worth the sum of dollars, in property within this state and exclusive of all property exempt from execution by the laws of this state.

E.... F....

G.... H....

[*Jurat.*]

193. Sheriff's return of arrest.

[*Venue.*]

I hereby certify and return that I have taken and arrested the within named C.... D.... as required by the within order [*add, if bail has not been given: and that the said C.... D.... remains imprisoned in the common jail in my county for want of bail*] [*or, in case defendant has made deposit in lieu of bail insert*]: and that the defendant has deposited with me dollars in lieu of and instead of bail in the above entitled action.

E.... F....

Sheriff of County.

194. Sheriff's certificate of deposit in lieu of bail (Wis. Stats. 1898 sec. 2698; N. Dak. Rev. Codes sec. 5322; S. Dak. Rev. Code C. P. sec. 175).

[*Title of court and of cause.*]

[*Venue.*]

I, E.... F...., sheriff of the county of, hereby certify that I have received from the defendant the sum of dollars as deposit instead of bail, being the amount named in the order of arrest in this action.

E.... F....

Sheriff of County.

195. Clerk's certificate of deposit in lieu of bail (Wis. Stats. 1898 sec. 2699; N. Dak. Rev. Codes sec. 5323; S. Dak. Rev. Code C. P. sec. 176).

[*Title of court and of cause.*]

[*Venue.*]

I, G.... H...., clerk of the court of county, hereby certify that the sheriff of said county has deposited in this court the sum of dollars, as having been paid to him by C.... D...., the defendant in this action, in lieu of an undertaking of bail herein.

G.... H....,

Clerk of the Court
of County.

196. Affidavit on motion to vacate arrest.

[*Title of court and of cause.*]

[*Venue.*]

C.... D.... being first duly sworn says:

1. That he is the defendant in the above entitled action.

2. That on the day of, 19.., this affiant was arrested by the sheriff of county, by virtue of an alleged order of arrest, a copy of which order and of the papers on which it was granted are hereto attached and made part hereof.

3. That he has not yet given bail as required by law, and is now actually confined by said sheriff in the county jail of county.

4. That, as he is advised and verily believes, his arrest is irregular, illegal, and the said order improvidently made for the following reasons [*here state grounds of illegality*].

5. That, as he is advised and verily believes, the said arrest is also irregular and illegal by reason of the following facts, which he avers to be true to his own knowledge [*state particularly additional facts which render the arrest illegal*].

C.... D....

[*Jurat.*]

197. Notice of motion to vacate arrest or reduce bail.

[*Title of court and of cause.*]

Sir:

Please take notice that on the pleadings and papers heretofore filed and served in this action, and on the affidavit of C.... D...., hereto annexed, the defendant C.... D.... will move the court, at a regular term to be held [*state where*] on the day of, 19.., at the opening of court on that day or as soon thereafter as counsel can be heard [*or, will move before Hon. (name the judge) at chambers (state where) at 10 o'clock A. M., or as soon thereafter as counsel can be heard*], as follows:

1. To vacate the order of arrest made in this action against this defendant; or,

2. To reduce the amount of bail on such arrest, if the court shall decline to vacate the same, and

3. For the costs of this motion and such other or further relief as to the court [*or, judge*] may seem just.

Dated, 19..

L.... M....
Defendant's Attorney,
[*Address.*]

198. Order vacating arrest.

[*Caption.*]

On reading and filing [*name the papers used on the motion*], and after hearing L.... M...., Esq., of counsel for defendant in support of the motion, and O.... P...., Esq., of counsel for plaintiff in opposition thereto; on motion of L.... M...., Esq., attorney for defendant,

ORDERED: 1st. That the order of arrest made in this action on the day of, 19.., by [*name court or judge*] against the defendant C.... D.... be and the same is hereby vacated.

2nd. That the undertaking given by said defendant and his bail upon such arrest be delivered up and the principal and sureties discharged therefrom.

3rd. That defendant have his costs of this motion allowed at ten dollars, to be paid [*state when*] by the plaintiff.

Dated, 19..

G.... H....
Circuit Judge.

199. Order reducing bail.

[*Proceed as in Form 198, and at close of recitals insert*]:

ORDERED: 1st. That the bail herein be and is reduced to the sum of dollars.

2nd. That defendant be required to give undertaking or make deposit only in such sum [*or, if bail has already been given, that the liability of the sureties on the undertaking of bail filed herein be and is reduced to said sum*]; [*or, that the sureties on said undertaking be allowed to file a new undertaking in such amount, and upon such filing the clerk is directed to surrender to them to be canceled the original undertaking filed herein.*]

Dated, 19..

By the Court:
G.... H...., Circuit Judge.

CHAPTER IX.

'APPEARANCE OF PARTIES.

- | | |
|---|---|
| <p>200. General appearance in person.</p> <p>201. The same, with demand of copy of complaint.</p> <p>202. General appearance by attorney.</p> <p>203. The same, with demand of copy of complaint.</p> | <p>204. The same, with waiver of notice of subsequent proceedings.</p> <p>205. Notice for special purpose only.</p> <p>206. The same, with motion to set aside service of summons, &c., and vacate proceedings.</p> |
|---|---|

200. General appearance in person.

[Title of court and of cause.]

To E.... F...., Plaintiff's Attorney.

Sir:

Please take notice that I appear in this action.

C.... D...., Defendant in Person,
No. Street, City of

201. The same, with demand of copy of complaint.

[Title of court and of cause.]

To E.... F...., Plaintiff's Attorney.

Sir:

Please take notice that I appear in this action, and demand that a copy of the complaint be served on me at my office, No., ... Street, in the city of

C.... D....
Defendant in Person,
No. Street,
City of

202. General appearance by attorney.

[Title of court and of cause.]

To E.... F...., Plaintiff's Attorney.

Sir:

Please take notice that I am retained by and appear for the defendant [*or, defendants; or, if not retained by all the de-*

fendants, the defendants G.... H.... and I.... K....] in this action.

L.... M...., Defendants' Attorney
[Or, Attorney for Defendants
G.... H.... and I.... K....],
No. Street, City of

203. The same, with demand of copy of complaint.

[*Title of court and of cause.*]

To E.... F...., Plaintiff's Attorney.

Sir:

Please take notice that I am retained by and appear for the defendant C.... D.... in this action; and demand that a copy of the complaint be served on me at my office, No.... Street, in the city of

G.... H....,
Attorney for the Defendant
C.... D.... [*Address.*]

204. The same, with waiver of notice of subsequent proceedings.

[*Title of court and of cause.*]

To E.... F...., Plaintiff's Attorney.

Sir:

Please take notice that we are retained by and appear for the above named defendant, C.... D...., in this action; and hereby waive notice of all subsequent proceedings herein, except [*here specify exception if any*].

Dated, 19..

G.... H....,
Attorney for the Defendant
C.... D.... [*Address.*]

205. Notice for special purpose only.

[*Title of court and of cause.*]

To E.... F...., Plaintiff's Attorney.

Sir:

Please take notice that we appear specially in this action for the defendant, C.... D...., as his counsel, for the purpose only of [*state what*] and that said C.... D...., defendant, does not appear generally herein.

Dated, 19..

G.... H....,
Attorney for the Defendant
C.... D.... [*Address.*]

206. The same, with motion to set aside service of summons, etc., and vacate proceedings.

[*Title of court and of cause.*]

Sir:

Please take notice that I appear specially for the defendant in this action, for the purpose of this motion only; and that upon the annexed affidavits of L.... M.... and O.... P.... and upon the summons, return and record herein I, so specially appearing, shall move, before the Hon. I.... K...., circuit judge, at his chambers in the court house in the city of, Wisconsin, on the day of, 19.., at 2 o'clock in the noon, or as soon thereafter as counsel can be heard, that the service of the summons in this action be set aside and vacated, and the action dismissed with costs, for the reason that [*here state reason, irregularities, etc*], with costs of motion.

Dated, 19..

G.... H....

Attorney for C.... D.... for
the purposes of this motion only.

[*Address.*]

To E.... F....

Plaintiff's Attorney.

CHAPTER X.

ATTACHMENT.

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| 207. Affidavit for attachment (Wisconsin). | 225. Affidavit by defendant for additional security. |
| 208. The same, by attorney or agent (Wisconsin). | 226. Notice of application for additional security (Wisconsin). |
| 209. Affidavit for attachment against defaulting municipal officer (Wisconsin). | 227. Order for additional security (Wisconsin). |
| 210. Affidavit for attachment on demand to become due (Wisconsin). | 228. Defendant's undertaking for release of attachment (Wisconsin). |
| 211. Affidavit for attachment in tort action. | 229. Notice of motion to vacate attachment (Wisconsin). |
| 212. Allegation of complaint on demand to become due, in an action where attachment is obtained. | 230. Order vacating attachment (Wisconsin). |
| 213. Amended affidavit of attachment (Wisconsin). | 231. Traverse of attachment (Wisconsin). |
| 214. Undertaking for writ of attachment (Wisconsin). | 232. Finding for defendant on trial of traverse (Wisconsin). |
| 215. Writ of attachment (Wisconsin). | 233. Petition of intervening creditor to set aside prior attachment. |
| 216. Indemnity bond to sheriff (Wisconsin). | 234. Order of hearing on said petition. |
| 217. Return of sheriff on attachment of personal property (Wisconsin). | 235. Order vacating attachment. |
| 218. Inventory and appraisal of attached personal property. | 236. Order awarding issues on said petition. |
| 219. Oath of appraisers. | 237. Petition for intervention by third person whose property is attached. |
| 220. Sheriff's return of levy on real property (Wisconsin). | 238. Affidavit for attachment (Minnesota). |
| 221. Notice to defendant of second levy on property previously attached (Wisconsin). | 239. Allowance of writ (Minnesota). |
| 222. Affidavit for order of sale of perishable property (Wisconsin). | 240. Bond on attachment (Minnesota). |
| 223. Order of sale of perishable property. | 241. Writ of attachment (Minnesota). |
| 224. Receipt of receiptor. | 242. Sheriff's return and certificate on attachment (Minnesota). |
| | 243. Affidavit of third person claiming title to attached property (Minnesota). |

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| <p>244. Indemnifying bond by plaintiff to sheriff (Minnesota).</p> <p>245. Sheriff's demand on third person for certificate (Minnesota).</p> <p>246. The same, where shares of stock are attached (Minnesota).</p> <p>247. Certificate of third person as to property held.</p> <p>248. Certificate by officer of corporation as to shares of stock (Minnesota).</p> <p>249. Affidavit of refusal to furnish certificate (Minnesota).</p> <p>250. Order for examination of third person refusing to furnish certificate (Minnesota).</p> <p>251. Bond by defendant for release of attachment.</p> <p>252. Discharge of attachment by plaintiff.</p> <p>253. Petition for writ of attachment (Iowa).</p> <p>254. The same, on debt not due (Iowa).</p> <p>255. Affidavit for attachment for debt due the state (Iowa).</p> <p>256. Affidavit for attachment of specific property (Iowa).</p> <p>257. Plaintiff's bond in attachment (Iowa).</p> <p>258. Writ of attachment (Iowa).</p> <p>259. Sheriff's return of writ (Iowa).</p> <p>260. Notice of ownership of attached property by third person (Iowa).</p> <p>261. Indemnifying bond by plaintiff (Iowa).</p> <p>262. Defendant's bond to perform judgment and discharge attachment (Iowa).</p> <p>263. Defendant's delivery bond (Iowa).</p> <p>264. Counter-claim by defendant on attachment bond (Iowa).</p> <p>265. Affidavit for attachment (North Dakota).</p> | <p>266. Plaintiff's undertaking for attachment.</p> <p>267. Warrant of attachment (North Dakota).</p> <p>268. Defendant's undertaking to pay judgment (North Dakota).</p> <p>269. Defendant's undertaking that property shall be forthcoming (North Dakota).</p> <p>270. Notice of attachment of real estate or bulky personal property, to be recorded in office of register of deeds (North Dakota).</p> <p>271. The same, to be served on the occupant or person in possession thereof (North Dakota).</p> <p>272. Plaintiff's indemnifying undertaking to the sheriff (North Dakota).</p> <p>273. Undertaking to obtain release of partnership property when the interest of one partner only is seized (North Dakota).</p> <p>274. Affidavit for attachment (South Dakota).</p> <p>275. Undertaking for attachment (South Dakota).</p> <p>276. Writ of attachment (South Dakota).</p> <p>277. Claim of ownership of attached property by third person (South Dakota).</p> <p>278. Notice of third person's claim to be given by sheriff to plaintiff (South Dakota).</p> <p>279. Oath to jurors upon trial of claim (South Dakota).</p> <p>280. Oath to witness upon trial of claim (South Dakota).</p> <p>281. Verdict of jury upon the trial of claim (South Dakota).</p> <p>282. Indemnifying undertaking by plaintiff after adverse verdict by sheriff's jury (South Dakota).</p> <p>283. Undertaking by defendant to discharge attachment (South Dakota).</p> |
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| <p>284. Affidavit for discharge of attachment on partnership property attached in an action against one partner alone (South Dakota).</p> <p>285. Undertaking for discharge of attachment on partnership property (South Dakota).</p> <p>286. Affidavit for attachment (Nebraska).</p> <p>287. Affidavit for attachment on debt not due (Nebraska).</p> | <p>288. Order granting attachment on claim not due (Nebraska).</p> <p>289. Undertaking for writ of attachment (Nebraska).</p> <p>290. Order of attachment (Nebraska).</p> <p>291. Inventory and appraisement of attached property (Nebraska).</p> <p>292. Undertaking by defendant to perform judgment (Nebraska).</p> |
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207. Affidavit for attachment (Wis. Stats. 1898 sec. 2731).

[Title of court and of cause.]

[Venue.]

A.... B.... being first duly sworn says that he is the plaintiff in the above entitled action; that the above named defendant, C.... D...., is indebted to him in a sum exceeding fifty dollars, to-wit, in the sum of dollars and interest thereon at the rate of per cent per annum from, 19.., over and above all legal set-offs, and that the same is due upon express, [or, implied] contract, and that affiant has good reason to believe, that said defendant has absconded from this state, to the injury of his creditors;

Or: that defendant is about to abscond from this state, to the injury of his creditors;

Or: that defendant is concealed in this state to the injury of his creditors;

Or: that defendant keeps himself concealed in this state with intent to avoid the service of a summons;

Or: that defendant has assigned, conveyed, disposed of or concealed, or is about to assign, convey, dispose of or conceal his property, or some part thereof, with intent to defraud his creditors; [or insert any other of the grounds of attachment contained in section 2731. Two or more clauses may be inserted in the same affidavit, but if so the grounds must be stated conjunctively.]¹

A.... B....

[Jurat.]

208. The same, by attorney or agent (Wisconsin).

[Title of court and of cause.]

[Venue.]

A.... B.... being first duly sworn says that he is the attorney for or agent of the plaintiff in this action, and makes this affi-

¹ Morrison v. Fake, 1 Pin. 133; Winner v. Kuehn, 97 Wis. 394.

davit in his behalf, and is hereunto duly authorized; that the above named defendant, C.... D...., is indebted to the above named plaintiff in a sum exceeding fifty dollars, to-wit, the sum of dollars and interest thereon from, 19.., over and above all legal set-offs, and that the same is due upon express [*or implied*] contract; that the above allegation of indebtedness is made upon information derived from a promissory note now in affiant's possession executed by said defendant and delivered by him to the plaintiff for the sum aforesaid and dated, 19.., for dollars, due in months with interest, the execution of which note and the non-payment thereof defendant has admitted to this affiant, and such information defendant verily believes to be true.²

And affiant further says that he has good reason to believe that the said defendant has assigned, conveyed, disposed of and concealed, or is about to assign, convey, dispose of and conceal his property, or some part thereof, with intent to defraud his creditors. [*Or, state other ground or grounds of attachment.*]

[*Jurat.*]

A.... B....

209. Affidavit for attachment against defaulting municipal officer (Wisconsin).

[*Title of court and of cause.*]

[*Venue.*]

A.... B.... being first duly sworn says that he is the attorney for the above named plaintiff, and makes the affidavit in its behalf as such attorney, and is duly authorized thereunto; that defendant, C.... D...., is indebted to the plaintiff in a sum exceeding fifty dollars, to-wit, in the sum of dollars and interest thereon from the day of, 19.., over and above all legal set-offs, and that the same is due upon express contract; that this action is brought against the defendant, C.... D...., as a principal on an official bond to recover money due to the state [*or, the county of, or, the city of*]; *or*, that deponent knows, and the fact is, that the action is brought against said defendant, C.... D...., as principal upon a bond given as evidence of indebtedness for, and to secure the payment of, money embezzled and misappropriated by such defendant

² If the affidavit contains a positive statement of the amount of the indebtedness it will be sufficient, without stating the means of knowledge, even if made by an agent; but if made upon information and belief the grounds upon

which affiant's belief is founded must be stated and knowledge derived from the plaintiff alone is insufficient. *Streissguth v. Riegelman*, 75 Wis. 212 s.c. 43 N. W. 1116.

and while acting as an officer of the state [*or*, county of
or, city of, the said plaintiff in this action.]

[*Jurat.*]

A.... B....

210. Affidavit for attachment on demand to become due (Wisconsin).

[*Title of court and of cause.*]

[*Venue.*]

A.... B.... being first duly sworn says that he is the plaintiff in the above entitled action; that C.... D...., the above named defendant, is indebted to him in a sum exceeding fifty dollars, to-wit, in the sum of dollars and interest thereon, from the day of, 19.., over and above all legal set-offs, and that the same is to become due upon express contract, to-wit, upon a promissory note made, executed and delivered to the plaintiff by said defendant, on the day of, 19.., wherein and whereby defendant promised to pay the plaintiff the sum of dollars months after date, with interest at the rate of per cent per annum from date until paid; and that deponent knows [*or* has good reason to believe], that the defendant [*here state ground or grounds of attachment as in preceding forms.*]

A.... B....

[*Jurat.*]

211. Affidavit for attachment in tort action.

[*Title of court and of cause.*]

[*Venue.*]

A.... B.... being first duly sworn says that he is the plaintiff in the above entitled action; that a cause of action sounding in tort exists in favor of the plaintiff and against the defendant above named and that the defendant is not a resident of this state; [*or*, that the residence of defendant is unknown to the plaintiff and cannot with due diligence be ascertained; *or*, that the defendant is a foreign corporation.]

A.... B....

[*Jurat.*]

212. Allegation of complaint on demand to become due, in an action where attachment is obtained.

[*Title of court and of cause.*]

The plaintiff, complaining of defendant, alleges:

I. That on or about the day of, 19.., defendant made, executed and delivered to plaintiff his certain promissory note in writing, of which the following is a copy [*insert copy of note*]; that plaintiff is the lawful owner and holder of said note, and there is to become due thereon on the day of,

19.., the sum of dollars and interest, from the date of said note; that the same is owing to him and to become due, over and above all legal set-offs; that this action is commenced before the said demand is due, to enable plaintiff to proceed by attachment in this action, for the reason that he knows [*or, has good reason to believe*] that the defendant [*here state ground or grounds of attachment.*]

WHEREFORE the plaintiff demands judgment, to be rendered after the maturity of the said demand for such sum as may then be due thereon, with costs, and prays that a writ of attachment may issue upon his affidavit and undertaking on file in this action, as provided by law.

E.... F....

Plaintiff's Attorney.

[*Verification.*]

[*Address.*]

213. Amended affidavit of attachment (Wis. Stats. 1898 sec. 2731a).

[*Title of court and of cause.*]

[*Venue.*]

A.... B.... being first duly sworn says that he is the plaintiff in the above entitled action; that he made an affidavit herein on the day of, 19.., for the issuance of a writ of attachment against the property of the defendant C.... D.... which is on file herein; that at the time of the making of said affidavit said defendant was and still is indebted to the plaintiff in a sum exceeding fifty dollars, to-wit, the sum of dollars and interest thereon from the day of, 19.., over and above all legal set-offs; and that the same then was and still is due upon express [*or, implied*] contract; that deponent had, at the time of making said affidavit, and still has good reason to believe that defendant [*state ground or grounds of attachment*]; that the deponent makes this affidavit in amendment of and as a substitute for said former affidavit filed herein and to stand in lieu thereof.

A.... B....

[*Jurat.*]

214. Undertaking for writ of attachment (Wis. Stats. 1898 sec. 2732).³

[*Title of court and of cause.*]

A writ of attachment in this action having been issued against the property of the defendant;

³ It is not necessary that the plaintiff should sign the undertaking. If the same be signed by sufficient sureties the statute is satisfied. *Shakman v. Koch*, 93 Wis. 595 s.c. 67 N. W. 925. If the

attachment be issued upon a demand not yet due the undertaking must be conditioned in three times the amount demanded in the affidavit. Wis. Stats. 1898 sec. 2731.

NOW, THEREFORE, we, G.... H...., of, farmer, and J.... K...., of, merchant, do hereby undertake, pursuant to the statute in such case made and provided, in the sum of dollars, that if the defendant recover judgment in this action the plaintiff will pay all costs that may be awarded to the defendant, and all damages which he may sustain by reason of the writ of attachment, not exceeding the sum above named.

Dated, 19..

G.... H....
J.... K....

[*Venue.*]

G.... H.... and J.... K...., each being first duly sworn before me, says each for himself that he is one of the subscribers to the foregoing undertaking; that his residence and occupation are therein truly stated; that he is a freeholder within this state and is worth dollars, the sum specified in said undertaking, in property within this state over and above all his debts and liabilities and exclusive of property exempt from execution.

G.... H....
J.... K....

[*Jurat.*]

215. Writ of attachment (Wis. Stats. 1898 sec. 2730).

[*Title of court and of cause.*]

THE STATE OF WISCONSIN to the Sheriff of said County of Greeting:

You are hereby commanded to attach and safely keep all the property of C.... D...., the defendant in the above entitled action, within your county, or so much thereof as may be sufficient to satisfy the demand of A.... B...., the plaintiff in the above entitled action, as specified in the affidavit of A.... B.... hereto annexed, to-wit, the sum of dollars, together with costs and expenses, and of this writ make due return to said court, according to law.

{ SEAL
of
COURT. }

WITNESS, the Hon. I.... K....
Presiding Judge of said Circuit
Court, for the County of,
at the court house in the of
....., in said County, this
day of, in the year of
Our Lord one thousand nine hun-
dred and

G.... H....
Plaintiff's Attorney.

E.... F....
Clerk.

216. Indemnity bond to sheriff (Wis. Stats. 1898 sec. 2739).

KNOW ALL MEN by these presents that we, A.... B.... as principal, and G.... H.... and J.... K.... as sureties, all of county, Wisconsin, are held and firmly bound unto L.... M...., sheriff of county, in the sum of one thousand dollars, lawful money of the United States, to be paid to the said L.... M...., his heirs, executors, administrators, or assigns, for which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated this day of, 19..

WHEREAS the above bounden A.... B.... has sued out a writ of attachment in a certain action now pending in the circuit court of county, against the property of C.... D...., defendant therein, and

Whereas said sheriff has doubts as to the ownership of the property which he is required to seize by virtue of said writ, and its liability to be taken thereunder,

NOW, THE CONDITION OF THIS OBLIGATION is such that if the said A.... B.... shall well and truly save harmless the said L.... M.... and indemnify him, and any and all persons assisting him in the premises, from all harm, damages, costs and expenses that shall or may at any time be incurred by him or them, as well for levying on and taking and holding the said property by virtue of said writ as for entering any building or premises for the taking of the same then this obligation to be void; otherwise of force.

	A.... B.... [Seal]
Signed, sealed and delivered	G.... H.... [Seal]
in presence of:	J.... K.... [Seal]
W.... X....	
Y.... Z....	

217. Return of sheriff on attachment of personal property (Wis. Stats. 1898 sec. 2736).

[Venue.]

I, L.... M...., sheriff of county, certify that, as commanded by the within writ, on the day of, 19.., at said county, I seized and now hold the property of the defendant described in the annexed inventory; that I caused the said property to be appraised by two disinterested freeholders of the county, who were first duly sworn by me to make a true appraisal thereof, which appraisalment is duly signed by them, and said inventory and appraisalment are returned herewith.

I further certify that on the day of, 19.., at said

county I personally served on the said defendant the said writ of attachment, affidavit and undertaking annexed and inventory, by delivering to and leaving with him true copies of each and all of the same.

[*If property is subject to levy under a prior attachment, add*]: I further certify, having made a first levy and seizure of said property in the action of O.... P...., plaintiff, vs. Q.... R...., defendant, and thereafter a second levy and seizure thereof by virtue of this writ of attachment in this action, I gave the defendant notice, endorsed upon said last mentioned writ, that the property seized in the last named action is the same property in said first named action, and in which the inventory and appraisal were so made, and that the notice annexed to this return is a true copy of the notice so endorsed.

L.... M....

Sheriff County.

218. Inventory and appraisal of attached personal property.

INVENTORY OF PERSONAL PROPERTY attached by virtue of annexed writ, the day of, 19..

Articles and Description.	Appraised by appraisers at
100 bushels of wheat..... 200 bushels of corn..... etc., etc., etc.	\$ cts.

We, X.... Y.... and Y.... Z...., do certify that we have this day of, 19.., appraised the above mentioned property, and that the foregoing is the appraisement thereof as made by us, and that the same is true and correct to the best of our knowledge and belief.

Dated, 19..

X.... Y....
Y.... Z....
Appraisers.

219. Oath of appraisers.

[Venue.]

X.... Y.... and Y.... Z.... being each duly sworn, each for himself says that he is a freeholder of said county, disinterested in this matter, and that he will make a true appraisement of the property mentioned in the foregoing inventory, so help him God.

X.... Y....
Y.... Z....

220. Sheriff's return of levy on real property (Wis. Stats. 1898 sec. 2737).

[Venue.]

I, L.... M...., sheriff of said county, do certify that pursuant to the within writ I have this day of, 19.., at said county, attached the following described real estate, and all the interest of the within named defendant therein, to-wit, [*describe the premises*] by filing in the office of the register of deeds on said day, at o'clock P. M. a true copy of this writ of attachment and of this certificate endorsed thereon.

L.... M....
Sheriff.

221. Notice to defendant of second levy on property previously attached (Wis. Stats. 1898 sec. 2736).⁴

[Venue.]

Notice is hereby given to the defendant C.... D.... that the property seized by virtue of the within writ, in the within named action, is the same property seized in the action of O.... P.... against Q.... R.... now pending in the court, in which the inventory and appraisal are made, and of which copies were served on him with the writ of attachment therein.

Dated, 19..

L.... M....
Sheriff County.

222. Affidavit for order of sale of perishable property (Wis. Stats. 1898 sec. 2740).

[Title of court and of cause.]

[Venue.]

L.... M...., sheriff of county, being first duly sworn, says that on the day of, 19.., a writ of attachment

⁴The giving of this notice is the lien by attachment is lost. jurisdictional, and it must be Bank v. Greenwood, 79 Wis. 269 given as the statute prescribes or s.c. 48 N. W. 421.

in the above entitled action was delivered to him commanding him to attach and safely keep all the property of the defendant above named within his county, or so much thereof as may be sufficient to satisfy the plaintiff's demand, to-wit, the sum of dollars, together with costs and expenses; that by virtue thereof this affiant, on the day of, 19.., seized in attachment among other things the following described goods and chattels, to-wit [*describe the same*]; that the same are of a nature likely to perish [*or, of such nature that the keeping thereof will be attended with much loss and expense*] for the following reasons [*here state facts showing property to be perishable or expensive*].

L.... M....

[*Jurat.*]

223. Order of sale of perishable property.

[*Title of court and of cause.*]

On reading and filing the annexed affidavit of L.... M...., sheriff of said county, it appearing that the property described is perishable;

ORDERED that the said property be sold in the following manner [*prescribe manner of sale and notice to be given*] and that the money realized from such sale be held by such officer in lieu of the property sold.

Dated, 19..

J.... K.... Circuit Judge
[*or, County Judge, or,*
Court Commissioner].

224. Receipt of receiptor.

[*Title of court and of cause.*]

WHEREAS L.... M...., sheriff of county, by virtue of a writ of attachment issued in this action, has attached the following goods and chattels as those of the defendant C.... D.... [*insert itemized list of goods as in inventory*].

RECEIVED of L.... M...., sheriff of county, the above mentioned goods and chattels, which I hereby promise and agree to deliver in the same condition as when the levy thereon was made, to him at any time when demanded, at, or in default of such delivery I agree to pay any sum which the said sheriff may become liable for by reason of said attachment and the premises.

Dated, 19..

O.... P....

225. Affidavit by defendant for additional security (Wis. Stats. 1898 sec. 2733).

[*Title of court and of cause.*]

[*Venue.*]

C.... D.... being first duly sworn says that he is the defendant in the above entitled action and that a writ of attachment has been issued in this action, and a large amount of property of the defendant attached, and the same is now held by the sheriff, to the value of dollars; that defendant is not satisfied with the amount specified in the undertaking given by the plaintiff herein, which is the sum of dollars only, nor with the sureties thereto, for the reason that said sum is insufficient, and the sureties are not, as affiant is informed and believes, sufficient.

This affiant says that he has fully and fairly stated the case in this action to L.... M...., Esq., his counsel therein, who resides at in said county, and that upon such statement he is advised by said counsel and verily believes that he has a valid defense to said action upon the merits, and to the whole thereof, and that he intends to answer the complaint and defend said action; and that he makes this affidavit for the purpose of making application for additional security.

C.... D....

[*Jurat.*]

226. Notice of application for additional security (Wis. Stats. 1898 sec. 2733).

[*Title of court and of cause.*]

Sir:

Please take notice that upon the affidavit of C.... D.... attached hereto, and upon the record and proceedings in said action, the above named defendant, by his counsel, will apply to the Hon. I.... K...., judge [*or*, court commissioner], of said court, at, on the day of, 19...., at o'clock in the noon, or as soon thereafter as counsel can be heard, for an order requiring the plaintiff to give additional security in this action, upon the execution of the writ of attachment issued herein, and such further order as may be proper in the premises.

Dated, 19..

E.... F....

Defendant's Attorney.

To O.... R....

Plaintiff's Attorney.

227. Order for additional security (Wis. Stats. 1898 sec. 2733).*[Title of court and of cause.]*

The application of the defendant for an order requiring additional security, upon the execution of the writ of attachment therein, coming on to be heard this day upon the record and proceedings had herein and upon the affidavits of C.... D.... and E.... F...., read at the hearing of said motion, and after hearing L.... M...., Esq., of counsel for defendant, and O.... P...., Esq., of counsel for plaintiff.

ORDERED that plaintiff be required to give and file another undertaking, to be approved by me, in the sum of dollars, with sureties, who shall justify their responsibility, such undertaking to be to the effect that if the defendant recover judgment in this action plaintiff will pay all costs that may be awarded to defendant and all damages which he may sustain by reason of the attachment, not exceeding the sum aforesaid.

Dated, 19..

J.... K...., Circuit Judge
[or, County Judge, or,
Court Commissioner].

228. Defendant's undertaking for release of attachment (Wis. Stats. 1898 sec. 2742).*[Title of court and of cause.]*

WHEREAS the property of the above named defendant has been taken by virtue of a writ of attachment issued herein and is now held by the sheriff of county; and,

Whereas the said defendant desires a release of the property from such attachment;

NOW, THEREFORE, to obtain such release, we, E.... F.... and G.... H...., of, in said county, merchants, do hereby jointly and severally undertake that we will on demand pay to the plaintiff the amount of the judgment, with all costs, that may be recovered against the defendant in this action, not exceeding dollars, with interest.

Dated, 19..

E.... F....
G.... H....

[Venue.]

E.... F.... and G.... H.... being each duly sworn, each for himself says that he is a resident and freeholder in this state and that he is worth the sum of dollars in property within this state over and above all his debts, and exclusive of all property exempt from execution.

E.... F....
G.... H....

[Jurat.]

229. Notice of motion to vacate attachment (Wis. Stats. 1898 sec. 2744).

[*Title of court and of cause.*]

Sir:

Please take notice that, upon the affidavit, undertaking, writ of attachment and sheriff's return thereon, filed in this action, and upon the complaint served and filed herein, the defendant, by his counsel, will at a regular term of said court, to be held at the court house in the city of, in said county, on the day of, 19.., at the opening of court on that day or as soon thereafter as counsel can be heard, move the court to vacate the said writ of attachment, for the reason that [*here state briefly the grounds on which the vacation is sought*].

Dated, 19..

E.... F....

To O.... K...., Esq.,
Plaintiff's Attorney.

230. Order vacating attachment (Wis. Stats. 1898 sec. 2744).

[*Title of court and of cause.*]

The motion to vacate the writ of attachment herein having come on to be heard upon the affidavit, undertaking, writ of attachment and sheriff's return herein, and the complaint filed and served, after hearing L.... M...., Esq., for defendant, and O.... P...., Esq., for plaintiff;

ORDERED that the writ of attachment herein be wholly vacated; that defendant be allowed dollars, the costs of this motion; and that the sheriff forthwith return all the property attached to the said defendant.

Dated, 19..

By the Court:

J.... K...., Circuit Judge.

231. Traverse of attachment (Wis. Stats. 1898 sec. 2745).

[*Title of court and of cause.*]

The above named defendant, for special answer to the affidavit for attachment herein denies the existence, at the time of making said affidavit, of the facts therein alleged as ground for attachment, that is to say, the defendant denies that at the time of making said affidavit he had absconded from this state, and denies that at that time he was about to abscond from this state

C.... D....

By E.... F...., his attorney.

[*Verification as in case of a pleading.*]

232. Finding for defendant on trial of traverse (Wis. Stats. 1898 sec. 2746).

[*Title of court and of cause.*]

The issue raised by the defendant's traverse of the affidavit for attachment in this action coming on to be tried, and having been tried before me, J. . . . K. . . . , circuit judge presiding, the court, after trial and hearing counsel, hereby finds and decides for the defendant upon such issue; and it is

ORDERED that the property attached in this action be forthwith delivered up to the defendant and said attachment dissolved.

And the defendant's costs upon the same are hereby taxed and allowed at dollars.

By the Court:

J. . . . K. . . . , Circuit Judge.

233. Petition of intervening creditor to set aside prior attachment.⁵

[*Title of original action.*]

To the Circuit Court for County:

THE PETITION of E. . . . F. . . . respectfully shows that on the day of , 19. . . , the above entitled action was commenced and a writ of attachment issued therein; that by virtue of such writ the sheriff of county thereafter seized upon and attached certain property of the defendant described as follows [*insert description of property attached*]; that thereafter and on the day of , 19. . . , your petitioner, who is a creditor of the said defendant, commenced an action against the said defendant in said court and duly sued out a writ of attachment in his said action, whereby the said sheriff duly attached the property of the said defendant hereinbefore described, subject however to the prior attachment in favor of the plaintiff in this action.

Petitioner further states that on the day of , 19. . . , judgment was duly rendered in the aforesaid action brought by your petitioner against said defendant for the sum of dollars, damages and costs, and that thereafter, on the day of , 19. . . , an execution was duly issued out of said court upon said last named judgment and delivered to the said sheriff, by virtue of which he levied upon the same property above described.

⁵ This proceeding by intervention is not authorized by express statute, but was suggested by the supreme court of Wisconsin in the case of McDonald v. Allen, 37 Wis. 108, and approved in Hawes v.

Clement, 64 Wis. 152 s.c. 25 N. W. 21. See also Breslauer v. Geilfuss, 65 Wis. 377 s.c. 27 N. W. 47; Nassauer v. Techner, Id. 388 s.c. 27 N. W. 40; Meissner v. Meissner, 68 Wis. 336 s.c. 32 N. W. 51.

Your petitioner further alleges that, as he is informed and verily believes, the writ of attachment issued in the action first above set forth and all proceedings thereon are illegal and void, and that the said levy of the said sheriff thereunder constitutes no lien upon the said property and against the lien of your petitioner, for the reason that [*here set forth the defect or illegality relied upon, by showing that the first attachment is void*].

[*Or, if the first attachment is attacked on the ground of fraud*]: Your petitioner further alleges that the said first writ of attachment is illegal, fraudulent and void and constitutes no lien upon the said property as against the lien of your petitioner, for the reason that [*here state the facts showing that the claim is collusive or fraudulent*].

WHEREFORE your petitioner prays that the said first named writ of attachment be set aside and vacated, and that petitioner's lien upon the property above described be declared and established, and that the said property and its proceeds be applied to the satisfaction of his said judgment, and for such other relief as to the court may seem just.

[*Verification.*]

E.... F....
Petitioner.

234. Order of hearing on said petition.

[*Title of original action.*]

Upon reading and filing the petition of E.... F.... praying that [*here state prayer of the petition*]; on motion of G.... H...., Esq., attorney for said petitioner;

IT IS ORDERED that the said petition be heard before this court at the term on the day of, 19.., at the opening of court on that day or as soon thereafter as counsel can be heard, and that said plaintiff A.... B.... and the said sheriff of county [*if other parties are adversely interested name them*] show cause at the said time and place why the said petition should not be granted, and that a copy of this order and the said petition be served on each of the said parties at least days before the time of said hearing, and until the further order of this court that all proceedings upon the said writ of attachment be stayed.

Dated, 19..

J.... K....
Circuit Judge.

235. Order vacating attachment.

[*Caption and title of original action as in Form 7.*]

The petition of E.... F.... in the above entitled matter having come on to be heard, upon reading the same and the affidavit

of L.... M.... in support thereof, and the affidavit of O.... P.... in opposition thereto, and upon the record and proceedings in said action, and after hearing counsel in support of and in opposition to said motion, and being fully advised in the premises;

It appearing that the writ of attachment heretofore issued in this action was and is insufficient and defective for the following reasons [*here state the facts showing the writ to be insufficient or void*].

On motion of G.... H...., attorney for the petitioner,

IT IS ORDERED that the prayer of the said petition be and is hereby granted, and that the said writ of attachment and the levy made by virtue thereof be and the same are hereby set aside and vacated, and that the said sheriff of county apply the property so attached [*or, the proceeds of the sale of said property so attached*] to the satisfaction of the judgment of the petitioner in the action brought by said petitioner against said defendant C.... D...., in which judgment was rendered in favor of said petitioner upon the day of, 19.., after deducting the legal costs, fees, and charges of said sheriff as allowed by law.

By the Court:

J.... K....

Circuit Judge.

236. Order awarding issues on said petition.

[*Title of original action.*]

[*Proceed as in Form 235 to the close of recitals, and continue as follows*]:

It appearing that certain issues have arisen by the allegations of said petition proper for trial by a jury; upon motion of G.... H...., attorney for the said petitioner;

IT IS ORDERED that the said petitioner be made a party defendant herein for the purpose of seeking the relief prayed for by said petition, and that the following issues arising between the said petitioner and the said plaintiff [*and name any other adverse party*] be and are hereby awarded:

1st. [*Here state issues to be tried, as for instance*]: Was this action and the writ of attachment therein fraudulent and void as against the petitioner as a creditor of said defendant?

2nd. [*Briefly state any other issues to be tried.*]

It is further ordered that the said issues be set for trial by jury on the day of, 19..

By the Court:

J.... K....,

Judge.

237. Petition for intervention by third person whose property is attached.*

[*Title of original action.*]

To the Circuit Court for County.

THE PETITION of L.... M.... respectfully shows that on the day of, 19.., the above entitled action was commenced and a writ of attachment issued therein, by virtue of which the sheriff of county seized and attached the following described property as the property of the defendant [*insert description of property*]; that in truth and in fact the said property so attached was and is not the property of the defendant, nor has he any interest therein, but was and is the property of this petitioner and the same is unlawfully held by the said sheriff upon the said writ of attachment.

WHEREFORE your petitioner prays that the alleged lien upon the said property under the said writ of attachment be removed and discharged, and for such further or other relief as shall seem just.

L.... M...., Petitioner.

[*Verification.*]

238. Affidavit for attachment (Minn. Rev. Laws 1905 secs. 4215, 4216).

[*Caption as in Form 5.*]

[*Venue.*]

Personally appeared before me A.... B.... who being first duly sworn says that he is the plaintiff [*or, the agent, or, attorney for the plaintiff*] in the above entitled action, which is brought for the recovery of money, and a summons has been issued therein.

That a cause of action exists against the defendant C.... D.... and in favor of said plaintiff, and the amount of said plaintiff's claim therein is dollars, and the ground thereof is as follows, to-wit, [*here set forth grounds of plaintiff's cause of action, as*] that on the day of, 19.., the defendant executed and delivered to the plaintiff for value his certain promissory note, of which the following is a copy [*insert copy of note*] which note is now held and owned by the plaintiff and no part thereof has been paid.

And affiant further says [*here set forth one or more of the grounds of attachment contained in the statute, as*] that the defendant is a foreign corporation [*or, that the defendant is not*

* This form is suggested to meet the provisions of Wis. Stats. 1898 sec. 2751a, as that section is new and there are no existing precedents.

a resident of this state, *or*, that the plaintiff's debt was fraudulently contracted, &c.]. [*If two grounds of attachment are stated they must be stated conjunctively; the facts and circumstances relied upon as constituting legal evidence of the existence of the ground of attachment alleged must also be stated.*]

And said affiant says that said plaintiff is in danger of losing his said claim by reason of the facts aforesaid, unless a writ of attachment issue; and prays that such writ of attachment may be allowed and issued against the property of said defendant according to the statute in such case made and provided; and said affiant says that no previous application has been made for such order.

A.... B....

[*Jurat.*]

239. Allowance of writ (Minn. Rev. Laws 1905 sec. 4215).

[*Title of court and of cause.*]

To the Clerk of said Court:

On filing the within affidavit and a bond approved by me in the within entitled cause, let a writ of attachment issue as within prayed.

Dated, 19..

J.... K...., Judge of said Court
[*or*, Court Commissioner]

240. Bond on attachment (Minn. Rev. Laws 1905 sec. 4217).[†]

[*Title of court and of cause.*]

KNOW ALL MEN by these presents that we, A.... B.... as principal, and E.... F.... and G.... H.... as sureties, are held and firmly bound unto C.... D...., the defendant above named, in the sum of dollars, lawful money of the United States, to be paid unto said C.. D., his heirs, executors, administrators or assigns, for which payment well and truly to be made we jointly and severally bind ourselves, and each of our heirs, executors and administrators, firmly by these presents.

Sealed with our seals and dated this day of, 19..

THE CONDITION OF THIS OBLIGATION is such, that whereas the above named plaintiff has applied for a writ of attachment against the property of C.... D...., the defendant in said action, and has filed an affidavit pursuant to the statute in such case made and provided,

[†] All bonds must be approved or acknowledged in like manner as a deed of real estate before they are received or filed. Rule 1,

Dist. Ct. Rules of Minn. As to qualifications of sureties, see Rule 2, *id.*

Now therefore, in case the defendant recover judgment or in case the writ shall be set aside or vacated, if the said plaintiff will pay all costs that may be awarded to said defendant, and all damages that he may sustain by reason of the attachment, not exceeding the penalty of this bond, then this obligation shall be void; otherwise to remain in full force.

IN TESTIMONY WHEREOF we have hereunto set our hands and seals this day of, 19..

Signed, sealed and delivered
in presence of:

W.... X....
Y.... Z....

A.... B.... [Seal]

E.... F.... [Seal]

G.... H.... [Seal]

[*Venue.*]

On this day of, 19.. before me, a notary public within and for said county, personally appeared A.... B...., E.... F.... and G.... H...., to me known to be the persons described in and who executed the foregoing instrument, and acknowledged that they executed the same as their free act and deed.

L.... M...., Notary Public
..... County, Minn.

[*Venue.*]

E.... F.... and G.... H.... being duly sworn, each for himself says that he is one of the sureties above named; that he is a resident and freeholder of the state of Minnesota, and worth the amount of dollars, specified in the foregoing bond, above his debts and liabilities, and exclusive of his property exempt from execution.

E.... F....
G.... H....

[*Jurat.*]

I hereby approve the within bond and the sureties thereon.

Dated, 19..

J.... K....

241. Writ of attachment (Minn. Rev. Laws 1905 sec. 4218).

[*Title of court and of cause.*]

The State of Minnesota to the Sheriff of County.

WHEREAS in the above entitled action an application has been duly made to the proper officer for a writ of attachment against the property of C.... D...., the defendant therein, setting forth by affidavit that a cause of action exists against such defendant and specifying the amount of claim and the ground thereof; and that the defendant is a foreign corporation [*or state the ground or grounds of the attachment as in the affidavit*]

and the bond required by law having been duly executed and filed, and said writ allowed and directed to issue by said officer;

THEREFORE you are hereby commanded and required to attach and safely keep all the property of said C.... D.... within your county and not exempt from execution, or so much thereof as may be sufficient to satisfy the said plaintiff's demand, which amounts to the sum of dollars, as appears by the complaint in said action, together with costs and expenses, and that you proceed therein in the manner required of you by law.

WITNESS the Hon. J.... K....,
[SEAL OF COURT.] Judge of the District Court aforesaid,
this day of, 19..
O.... P...., Clerk.

242. Sheriff's return and certificate on attachment (Minn. Rev. Laws 1905 sec. 4219).

[Venue.]

I hereby certify and return that by virtue of the within writ of attachment I have on this day of, 19.., at the city of in said county, levied on all the right, title and interest of the within named defendant, C.... D...., in and to the following described real [*or, personal*] property, to-wit [*here insert accurate description of the real estate or an inventory of the personal property attached*].

WITNESS my hand this day of, 19..

E.... F....,
Sheriff of County, Minn.
By G.... H...., Deputy.

[Venue.]

I hereby certify that I have compared the within copy of the writ of attachment in the within entitled action, and of my return and inventory of attached property thereon as above, with the original writ, return and inventory in my possession, and that the same are true and correct copies thereof and of the whole thereof.

WITNESS my hand this day of, 19..

E.... F....,
Sheriff of County, Minn.

243. Affidavit of third person claiming title to attached property (Minn. Rev. Laws 1905 sec. 4213).

[Venue.]

E.... F.... being duly sworn says that pursuant to the writ of attachment issued in the above entitled action the sheriff of county, on the day of, 19.., seized and

attached certain personal property at the city of in said county, described as follows, [*insert description of personal property*] as the property of the above named defendant, C.... D....

Affiant further says that the said property so seized was not at the time of such seizure the property of said C.... D...., but was at that time and still is the property of this affiant, and that the ground of affiant's title and right to said property is as follows [*here state the grounds of the affiant's title in full, as for instance: that the said defendant, C.... D...., on the day of, 19.., and before the levy of said attachment, for value, sold and delivered the said property to this affiant*].

Affiant further says that the value of the said property is dollars, and that he makes this affidavit for the purpose of obtaining possession of said property from the said sheriff.

E.... F....

[*Jurat.*]

To E.... F...., Esq., Sheriff of County.

TAKE NOTICE that I claim the property described in the foregoing affidavit, and demand delivery thereof.

Dated, 19..

E.... F....

244. Indemnifying bond by plaintiff to sheriff (Minn. Rev. Laws 1905 sec. 4213).

[*Title of court and of cause.*]

KNOW ALL MEN by these presents that we, A.... B.... as principal, and G.... H.... and J.... K.... as sureties, all of county, Minnesota, are held and firmly bound unto L.... M...., sheriff of county, in the sum of dollars lawful money of the United States, to be paid to the said L.... M...., his heirs, executors, administrators or assigns, for which payment well and truly to be made we bind ourselves, our heirs, executors, administrators and assigns jointly and severally by these presents.

Sealed with our seals and dated this day of, 19..

WHEREAS the above bounden A.... B.... has sued out a writ of attachment in a certain action now pending in the court of county against the property of C.... D...., defendant therein; and whereas the said sheriff, under the said writ of attachment has seized and attached certain personal property described as follows [*insert description*] as the property of the defendant C.... D....; and whereas one E.... F.... claims title to the said property so attached and has made affidavit of his said title, as required by the statutes of Minnesota;

NOW, THEREFORE, the condition of this obligation is such that if the said A.... B.... shall well and truly save harmless

the said L.... M...., sheriff as aforesaid, and indemnify him from all harm, damages, cost and expenses which shall or may at any time be incurred by him or them to the said E.... F.... for levying upon, taking, and holding the said property by virtue of said writ, then this obligation to be void; otherwise of force.

	A.... B.... [Seal]
Signed, sealed and delivered	G.... H.... [Seal]
in presence of:	J.... K.... [Seal]

W.... X....

Y.... Z....

[Add acknowledgment and justification of sureties as in Form 240.]

245. Sheriff's demand on third person for certificate (Minn. Rev. Laws 1905 secs. 4219, 4300, 4301).

[Title of court and of cause.]

To E.... F...., Esq.

You will please take notice that under the writ of attachment, a certified copy of which is hereto attached, and served upon you, I have attached all moneys, goods, credits, effects, debts due or owing, and all other personal property in your possession or under your control belonging to defendant C.... D.... named in said writ; and I hereby demand that you furnish me with a certificate specifying the amount, nature and description of the property held by you for the benefit of the defendant and of the debt or debts owing by you to the defendant.

Dated, 19..

L.... M....

Sheriff of County.

246. The same, where shares of stock are attached (Minn. Rev. Laws 1905 secs. 4219, 4301).

[Title of court and of cause.]

To E.... F...., President [or, Secretary] of the G.... H.... Company.

You will please take notice that under the writ of attachment issued in the above entitled action I have attached all the stock or interest in stock held by the said defendant, C.... D...., in the G.... H.... Company, a corporation, and I demand that you furnish me with a certificate designating the number of rights or shares of the said defendant, C.... D...., in the stock of said corporation, together with any dividend or incumbrance thereon.

Dated, 19..

L.... M....

Sheriff of County.

247. Certificate of third person as to property held.

[*Title of court and of cause.*]

In pursuance of the demand made upon me by L.... M...., sheriff of county, Minnesota, I, E.... F...., hereby certify that I hold for the benefit of the defendant, C.... D...., the following described property [*insert description of property*] [*or, that I am indebted to the defendant, C.... D...., herein in the sum of dollars.*]

Dated, 19..

E.... F....

To L.... M....,

Sheriff of County.

248. Certificate by officer of corporation as to shares of stock (Minn. Rev. Laws 1905 secs. 4219, 4301).

[*Title of court and of cause.*]

In pursuance of the demand made upon me by L.... M...., sheriff of county, I, E.... F...., president of the G.... H.... company, a corporation, do hereby certify that the defendant, C.... D...., owns shares of stock of the said corporation and that there are no dividends or incumbrances thereon, as shown by the books of said corporation.

Dated, 19..

E.... F....

To L.... M....,

Sheriff of County, Minn.

249. Affidavit of refusal to furnish certificate (Minn. Rev. Laws 1905 secs. 4219, 4301).

[*Title of court and of cause.*]

[*Venue.*]

L.... M.... being duly sworn says that he is sheriff of the county of, Minnesota, and that on the day of, 19.., he served upon E.... F...., Esq., at the city of, in said county, a written demand for a certificate of the property of said C.... D...., the defendant herein, in possession of or under the control of the said E.... F.... and held by him for the defendant, a true copy of which demand is attached hereto, marked exhibit A; that at the time of making and serving the said demand deponent made known to said E.... F.... that he had in his hands a warrant of attachment against the property of said C.... D...., and that he then left with the said E.... F.... a certified copy of the said writ together with a notice specifying the property attached; that said E....

F.... then and there refused and has since continued to refuse to furnish to deponent the certificate so demanded, and that deponent prays that the said E.... F.... may be required to be examined on oath concerning the same.

L...M....

[*Jurat.*]

250. Order for examination of third person refusing to furnish certificate (Minn. Rev. Laws 1905 secs. 4219, 4301).

[*Title of court and of cause.*]

Upon the affidavit of L.... M...., sheriff of county, Minnesota, and upon the records and proceedings on file in this action;

It appearing that E..... F....., of the city of, in said county, has refused to furnish the said sheriff with a certificate as required by the provisions of sections 4219 and 4301 of the Revised Laws of Minnesota for the year 1905, although such certificate has been duly demanded; now, upon motion of G.... H...., attorney for the plaintiff herein,

IT IS ORDERED that said E.... F.... attend before me on the day of, 19.., at the court house in city of, at o'clock in the noon of said day, and be examined and submit to an examination on oath concerning the amount, nature and description of the property of the said C.... D.... in the possession and under the control of the said E.... F....

J.... K....

District Judge.

251. Bond by defendant for release of attachment.

[*Title of court and of cause.*]

KNOW ALL MEN by these presents that we, C.... D.... as principal, and E.... F.... and G.... H.... as sureties, are held and firmly bound unto A.... B.... the above named plaintiff in the sum of..... dollars lawful money of the United States, to be paid unto the said A.... B.... his heirs, executors, administrators or assigns, for which payment well and truly to be made we jointly and severally bind ourselves, and each of our heirs, executors and administrators, firmly by these presents.

Sealed with our seals and dated this day of, 19..

THE CONDITION OF THIS OBLIGATION is such that, whereas certain property of said defendant C.... D.... has been levied upon and seized under a writ of attachment issued in the above entitled action, and said defendant desires to have said property discharged from said attachment;

Now, therefore, if the said defendant shall pay such judgment as said plaintiff shall recover in said action [in case plaintiff recovers judgment], or an amount thereof equal to the value of the property attached as aforesaid, then this obligation shall be void; otherwise to remain in full force.

IN TESTIMONY WHEREOF we have hereunto set our hands and seals this day of, 19..

Signed, sealed and delivered
in presence of:

C.... D.... [Seal]

E.... F.... [Seal]

G.... H.... [Seal]

W.... X....

Y.... Z....

[Add acknowledgment and justification of sureties and approval as in plaintiff's bond hereinbefore given.]

252. Discharge of attachment by plaintiff.

[Title of court and of cause.]

[Venue.]

I, A.... B...., the above named plaintiff, do hereby certify that a certain writ of attachment issued in the above entitled action, on the day of, 19.., and under and by virtue thereof the following described premises and real estate situate in the county of and state of Minnesota, described as follows *[insert description]* were attached by the sheriff of county, and which attachment was filed for record in the office of the register of deeds of said county of on the day of, 19.., at o'clock .. M., and duly recorded therein in book ... of, on page, is hereby discharged and released, and the effect thereof annulled. And the register of deeds of said county is hereby authorized and directed to discharge the same upon the record thereof, according to the statute in such case made and provided.

IN TESTIMONY WHEREOF I, the said A.... B...., have hereunto set my hand and seal this day of 19..

A.... B.... [Seal]

Signed, sealed and delivered
in presence of:

W.... X....

Y.... Z....

[Add acknowledgment as in case of a deed.]

253. Petition for writ of attachment (Iowa Code sec. 3878).

[Caption as in Form 6.]

The plaintiff alleges as a cause of action against the above named defendant *[here set out the facts constituting the cause*

of action]; that there is now due the plaintiff thereon from the defendant the sum of dollars.

The plaintiff further alleges [*here state one or more of the grounds of attachment mentioned in the Code; if more than one ground is stated they must not be stated in the alternative*].

[*If the writ is desired to be issued on Sunday insert*]: Plaintiff further alleges that he will lose his claim unless the writ of attachment herein is issued and served on Sunday.

WHEREFORE plaintiff demands judgment against said defendant for the sum of dollars, with interest from the day of, 19.., and costs; and plaintiff also asks that a writ of attachment issue against the lands and tenements, goods and chattels, rights and credits of said defendant.

E.... F....

Attorney for Plaintiff.

[*Venue.*]

I, A.... B...., being duly sworn, depose and say that I am the plaintiff in the above entitled action; that I have read [*or, heard read*], the foregoing petition, and that the statements therein are true as I believe.

A.... B....

Sworn to and subscribed in my presence by the said A.... B.... this day of, 19..

G.... H...., Clerk of the District Court of County.

[*Allowance of writ in tort action, under Iowa Code sec. 3882, to be endorsed on the foregoing*]:

Let a writ of attachment issue in this action, and property to the amount of dollars in value be levied upon.

J.... K...., Judge.

254. The same, on debt not due (Iowa Code sec. 3883).

[*Title of court and of cause.*]

The plaintiff alleges as a cause of action against the above named defendant [*here allege facts constituting a cause of action on contract against the defendant*]; that said debt will be due from the defendant to the plaintiff on the day of, 19.., and that nothing but time is now wanting to fix the defendant's absolute indebtedness to the plaintiff in the sum of dollars; that said defendant is about to dispose of his property with intent to defraud his creditors [*or state any other ground of attachment as contained in section 3883, Iowa Code*].

[*Continue as in Form 253 after the statement of ground of attachment, including the verification.*]

255. Affidavit for attachment for debt due the state (Iowa Code sec. 3919).

[*Title of court and of cause.*]

[*Venue.*]

L.... M.... being duly sworn says that he is county attorney in and for county, Iowa [*or, attorney general of the state of Iowa*], and that he verily believes there is justly due the state of Iowa from C.... D...., the defendant herein, the sum of dollars, as stated in the foregoing petition [*or, the petition on file in this action*]; that on or about the day of, 19.., he demanded said sum of the defendant, and he refused to pay or secure the same or any part thereof,^s and that unless an attachment is issued against the property of said defendant there is danger that said amount due will be lost to the state.

L.... M....,

County Attorney of County.

[*Or, Attorney General of the State of Iowa.*]

[*Jurat.*]

256. Affidavit for attachment of specific property (Iowa Code sec. 3913).

[*Title of court and of cause.*]

[*Venue.*]

A.... B.... being duly sworn says that he is the plaintiff in the above entitled action, and that said action is brought to foreclose a mortgage upon certain personal property [*particularly describing same*], as more fully appears by the verified petition on file in this action; that the plaintiff has a just claim against the defendant, C.... D...., as stated in said petition, and that the said personal property is about to be sold and removed from the state [*or, that plaintiff has reasonable cause to believe and does believe that unless prevented by the court the said property will be sold and removed from this state*].

WHEREFORE he prays that an attachment be granted against said property.

A.... B....

[*Jurat.*]

[*Allowance, Iowa Code sec. 3915, to be endorsed on the foregoing*]:

Let a writ of attachment issue in this action, and let the property named in this affidavit be seized under such writ upon the

^s In actions for money due to the state where an attachment is sued out, it is contemplated by the statute that the attachment shall be issued only when a de-

mand has been made upon the debtor for payment or security, and has been refused. State v. Morris, 50 Ia. 203.

following terms and conditions [*here state conditions as to security and the disposition of the property*].

J.... K...., Judge, &c.

257. Plaintiff's bond in attachment (Iowa Code sec. 3885).

[*Title of court and of cause.*]

KNOW ALL MEN by these presents that I, A.... B.... as principal, and E.... F.... and G.... H.... as sureties, are held and firmly bound unto C.... D.... in the penal sum of dollars, for the true payment of which to the said C.... D...., his heirs, executors and assigns, we bind ourselves, our heirs, executors and assigns.

THE CONDITION OF THE ABOVE OBLIGATION is such that, whereas the said A.... B...., plaintiff, has this day sued out of the office of the clerk of the District Court of the state of Iowa in and for county an attachment against the property of said C.... D...., defendant;

Now, if the said plaintiff shall pay the defendant all the damages which he may sustain by reason of the wrongful suing out of said writ of attachment, then this bond to be void; otherwise in full force.

Dated at this day of, 19..

A.... B....

E.... F....

G.... H....

[*Venue.*]

E.... F.... and G.... H.... being each duly sworn, each for himself says that he is a resident of the state of Iowa and is one of the sureties who signed the foregoing bond, and that he is worth the sum of dollars beyond the amount of his debts, and that he has property liable to execution in the state of Iowa equal to dollars.

E.... F....

G.... H....

[*Jurat.*]

The within bond filed and sureties thereon approved by me this day of, 19..

J.... K...., Clerk, &c.

258. Writ of attachment (Iowa Code sec. 3889).

[*Title of court and of cause.*]

THE STATE OF IOWA to

the Sheriff of County.

Greeting:

Whereas A..... B..... has filed his petition in the office of the clerk of the district court of the state of Iowa in and for

..... county, duly sworn to according to law, claiming of C.... D.... the sum of dollars, as money due on contract, and alleging that said defendant C.... D.... [*here may be stated the ground of attachment*] and asking for a writ of attachment against the goods, chattels, rights and credits, lands and tenements of the said C.... D...., and has filed his bond as required by law;

NOW, THEREFORE, you are hereby commanded to attach the goods and chattels, rights and credits, lands and tenements of said C..... D..... except such as are by law exempt from execution, wherever the same may be found in your county, or so much thereof as may be necessary to satisfy said plaintiff's claim as above stated, with interest at seven per cent thereon from the day of, 19.., and costs, and safely preserve the same to be dealt with as required by law; and of this writ you will make due and legal service and return to our said court on or before the first day of the next term thereof.

WITNESS my hand and the seal of said district court hereunto affixed, at my office in this day of, 19..

[SEAL]

E.... F....

Clerk, &c.

259. Sheriff's return of writ (Iowa Code sec. 3923).

[*Venue.*]

I hereby certify and return that I received the within writ of attachment on the day of, 19.., at o'clock .. M. That on the day of, 19.., by virtue of said writ, I levied upon and attached the following described real estate as the property of the defendant, to-wit [*here describe the land, giving book and page where deed under which defendant claims is recorded*];

And also, on the same day, by virtue hereof, I levied on and attached the following described personal property as the property of said defendant, to-wit [*here describe accurately each article of property taken or, if desired and the articles are numerous say, a schedule of which is hereto annexed marked Exhibit A and made a part of this return*];

And also, by virtue hereof, on the day of, 19.., I attached O.... P.... as garnishee by informing him that he was attached as garnishee in said cause and leaving with him a written notice, a copy of which is attached hereto and marked Exhibit B and made a part hereof; and I further certify and return that by direction of the plaintiff I took the answer of said garnishee, which is returned herewith marked Exhibit C and made a part hereof;

I further certify and return that on the day of, 19.., the defendant, with E.... F.... and G.... H.... as sureties, executed and delivered to me the bond hereto attached marked Exhibit D and made a part hereof, whereupon I discharged said personal property from said levy and delivered the same to defendant;

I further certify and return that on the day of, 19.., I gave the defendant notice of said attachment, and also Y.... Z.... who at said time was in possession of said real estate; and I now return said writ.

Dated the day of, 19..

L.... M...., Sheriff, &c.

**260. Notice of ownership of attached property by third person
(Iowa Code secs. 3906, 3991).**

[Title of court and of cause.]

To L.... M...., Sheriff of County, Iowa.

You are hereby notified that the black horse [*or otherwise describe the property fully*] which you did on the day of, 19.., levy on as the property of C.... D.... by virtue of a writ of attachment issued out of the district court of county, Iowa, in the case of A.... B...., plaintiff, against C.... D...., defendant, belongs to me [*or if the affidavit is made by an agent or attorney say: belongs to E.... F....*]; that my [*or, his*] interest therein is that of absolute owner [*or state nature of interest*]; that I [*or, he*] acquired such interest by purchasing the said horse on the day of, 19.., from Y.... Z.... and I [*or, he*] paid therefor dollars [*or state facts showing how and from whom he acquired his interest in the property and the consideration paid*] and I demand of you the immediate release and surrender of the said horse.

Dated, 19..

E.... F....

[*Or, E.... F...., by G....
H.... his Agent, or Attorney.*]

[Venue.]

E.... F.... being duly sworn says he is the person who signed the foregoing notice and claim; that he has read [*or, heard read*] said notice, and that the facts stated therein are true [*if this affidavit is made by an agent or attorney it should commence: G.... H.... being duly sworn says he is the agent or, attorney, for E.... F.... and is the person who signed, &c.*]

E.... F....

[*Or, G.... H....*]

[Jurat.]

261. Indemnifying bond by plaintiff (Iowa Code secs. 3906, 3992).[*Title of court and of cause.*]

KNOW ALL MEN by these presents that we, A.... B.... as principal, and E.... F.... and G.... H.... as sureties, are held and firmly bound unto L.... M...., sheriff of county, Iowa, in the penal sum of dollars lawful money of the United States, for the payment of which well and truly to be made to the said sheriff, his heirs, executors and assigns we bind ourselves, our heirs, executors and administrators jointly and severally firmly by these presents.

THE CONDITION of this obligation is such that, whereas the said L..... M....., sheriff as aforesaid, has in his hands to be executed, a certain writ of attachment issued from the office of the clerk of the district court of county, Iowa, in an action pending in said court, wherein A.... B.... is plaintiff and C.... D.... is defendant, which said writ is directed to said sheriff;

NOW, if said obligors shall and will indemnify the said L.... M...., sheriff, against all damages which he may sustain in consequence of the seizure or sale, on said writ, of the following described personal property, to-wit [*here describe particularly the property*], and shall and will warrant and make good to the purchaser thereof at such sale all the estate and interest which shall be sold therein under said sale, then this obligation to be void; otherwise to remain in full force and virtue.

Dated this day of, 19..

A.... B....
E.... F....
G.... H....

[*Add justification of sureties.*][*Approval of indemnifying bond, as follows*]:

The foregoing bond taken, and the sureties therein, approved by me this day of, 19..

L.... M....

Sheriff of County, Iowa.

262. Defendant's bond to perform judgment and discharge attachment (Iowa Code sec. 3907).[*Title of court and of cause.*]

KNOW ALL MEN by these presents that we, C.... D...., principal, and E.... F.... and G.... H...., sureties, are held and firmly bound unto A.... B.... in the sum of dollars lawful money of the United States, for the payment of which well and truly to be made to the said A.... B...., his heirs,

executors and assigns, we bind ourselves, our and each of our heirs, executors and administrators jointly and severally firmly by these presents.

THE CONDITION of this obligation is such that, whereas L..... M....., sheriff of county, Iowa, by virtue of a writ of attachment to him directed, and issued out of the office of the clerk of the district court of the state of Iowa in and for county, in an action wherein A.... B.... is plaintiff and said C.... D.... is defendant, did on the day of, 19.., levy upon and attach the following described property of the said C.... D...., to-wit, [*here insert description of the property levied on*]; and whereas the said C.... D.... desires to have said attachment and levy discharged, and to obtain restitution of said property;

NOW, THEREFORE, if the said C.... D.... shall well and truly perform any judgment of said court which may be rendered against him in said action, then this obligation to be null and void; otherwise to remain in full force and virtue.

WITNESS our hands this day of, 19..

C.... D....
E.... F....
G.... H....

[*Add justification of sureties.*]

[*Add following approval of bond*]:

Executed in presence of O.... P.... clerk [*or, sheriff, as the case may be*], and I hereby approve the within bond and sureties therein, this day of, 19..

O.... P...., Clerk,
[*or, Sheriff*].

263. Defendant's delivery bond (Iowa Code sec. 3909).

[*Proceed as in Form 262 down to the condition of the bond, and continue as follows*]:

THE CONDITION of this obligation is such that, whereas L..... M....., sheriff of county, Iowa, by virtue of a writ of attachment directed to him and issued out of the office of the clerk of the district court of the state of Iowa, in and for county, in an action wherein said A.... B.... is plaintiff and said C.... D.... is defendant, did on the day of, 19.., levy upon and attach the following described personal property as the property of the said C.... D...., to-wit, [*here describe the attached property*].

NOW, THEREFORE, if the above described property, or its appraised value, shall be delivered to the said sheriff or to his successor in office to satisfy any judgment which may be obtained

against the said C.... D.... in said action, within twenty days after the rendition of said judgment, then this obligation to be void; otherwise to remain in full force and virtue.

WITNESS our hands this day of, 19..

C.... D....

E.... F....

G.... H....

[*Add justification of sureties.*]

[*Add approval, as follows*]:

The within bond taken and sureties therein approved by me this day of, 19..

O.... P...., Sheriff;
[*or*, Clerk].

264. Counter-claim by defendant on attachment bond (Iowa Code sec. 3888).

[*Title of court and of cause.*]

The defendant, for answer to the plaintiff's petition herein, alleges:

I. [*Here plead the facts showing defense to the indebtedness set up in the petition upon the merits.*]

II. Further answering the plaintiff's petition, and by way of counter-claim herein, the defendant alleges that on the day of, 19.., this action was commenced in the district court of county, Iowa, by the plaintiff claiming of the defendant the sum of dollars as due on a certain promissory note [*or briefly state the cause of action as set forth in the petition*] and that the plaintiff procured a writ of attachment to be issued in said action against the property of this defendant, and caused the same to be placed in the hands of the sheriff of said county for service, under and by virtue of which writ of attachment the said sheriff levied on the property of this defendant described as follows: [*here insert description of the property attached*] and that plaintiff has converted all of said property to his own use.

III. That in the plaintiff's petition in this action it was alleged as grounds for the issuance of said writ of attachment that [*here state the grounds of the attachment contained in the petition*]; that after the filing of said petition and before issuance of said writ the plaintiff filed in the office of the clerk of this court his bond with sureties for the benefit of this defendant as required by law, a copy of which bond is hereto attached and made a part of this counter-claim and marked Exhibit A.

IV. That at the time of the filing of said petition and bond and the issuance of said writ the plaintiff had no reasonable

ground to believe the truth of the statements contained in his said petition as grounds for the issuance of said writ of attachment, and that at said time he well knew that the grounds so stated were false; that this defendant at the said time had not [*here negative the facts alleged as the ground of the attachment*], all of which was well known to the plaintiff at the time said petition was verified and said writ issued; that said writ of attachment was wilfully and maliciously sued out by the plaintiff with the intention and design of injuring this defendant and that defendant was in fact greatly damaged thereby, to-wit, in the sum of dollars, as follows: [*here insert proper allegations showing how the damages accrued and the amount thereof*].

V. That plaintiff has not paid defendant any part of the damages so sustained by him by reason of the wrongful suing out of said writ of attachment, and that defendant is the owner of all of said claims.

WHEREFORE defendant demands judgment against the plaintiff for dollars damages, and his costs.

E.... F....

Attorney for Defendant.

[*Add verification.*]

265. Affidavit for attachment (N. Dak. Rev. Codes sec. 5356).²

[*Caption as in Form 6.*]

[*Venue.*]

A.... B...., the plaintiff above named, being first duly sworn, says that C.... D...., the above named defendant [*here set out in the language of the statute one or more of the grounds of attachment; if more than one ground is stated they should be stated conjunctively*].

A.... B....

Subscribed and sworn to before me this day of, 19..

O.... P....

Clerk of the District Court.

266. Plaintiff's undertaking for attachment.

[*Title of court and of cause.*]

WHEREAS A.... B...., the above named plaintiff, has commenced an action on a contract [*or, on a judgment*] for the recovery of money only, against C.... D...., said defendant, and has made application for a warrant of attachment against

² In North Dakota the warrant of attachment is based upon the verified complaint as well as upon

the affidavit. N. Dak. Rev. Codes sec. 5356.

the property of the said C.... D.... in pursuance of the statute in such case made and provided;

NOW, THEREFORE, if C.... D...., the said defendant, recover judgment against A.... B...., the said plaintiff, or if the attachment be set aside by order of the court, we, A.... B...., the said plaintiff as principal, and E.... F.... and G.... H...., as sureties, undertake, promise and agree to and with said defendant that the said plaintiff shall and will pay all costs that may be awarded to said defendant, and all damages he may sustain by reason of the said attachment, not exceeding the sum of dollars.

Dated this day of, 19..

Signed, sealed and delivered
in presence of:

W.... X....
Y.... Z....

A.... B....
E.... F....
G.... H....

[*Venue.*]

On this day of, 19.., before me, L.... M...., clerk of the district court within and for said county and state, personally appeared A.... B...., E.... F.... and G.... H...., known to me to be the persons who are described in and who executed the foregoing and within instrument, and severally acknowledged to me that they executed the same.

[SEAL.] L.... M...., Clerk of
the District Court of County.

[*Venue.*]

E.... F.... and G.... H.... being first duly sworn, each for himself says that he is a resident and freeholder [*or, householder*] within the state of North Dakota, and is worth the sum of dollars in property within this state exclusive of property exempt from execution.

E.... F....
G.... H....

[*Jurat.*]

267. Warrant of attachment (N. Dak. Rev. Codes sec. 5357).

[*Title of court and of cause.*]

THE STATE OF NORTH DAKOTA to

the Sheriff of the County of,

Greeting:

A verified complaint in the above entitled action having been filed in the office of the clerk of said court, setting forth a proper cause of action for attachment, in which the plaintiff demands judgment against defendant for the sum of dollars,

and interest at the rate of per cent per annum from the day of, 19.., and an affidavit having also been filed stating that the defendant [*here set out the statutory ground or grounds of attachment stated in the plaintiff's affidavit*];

NOW, you are hereby required to attach and safely keep all the property of said defendant within your county not exempt from execution, or so much thereof as may be sufficient to satisfy the plaintiff's demand, with costs and disbursements, unless the defendant delivers to you an undertaking in favor of the plaintiff, with sufficient surety to the effect that defendant will pay any judgment which the plaintiff may obtain against him in the action, or an undertaking with like surety to the effect that the property of said defendant which has been or is about to be attached shall be forthcoming in substantially as good condition as it is at the time of giving the undertaking, to answer such judgment, such undertaking in either event to be in an amount equal to the value of such property according to your inventory, in either of which cases you will take such undertaking, and when your warrant shall be fully executed or discharged you are required to return the same with your proceedings to this court.

WITNESS the Hon. J.... K..., Judge of the District Court in and for said County, and the seal of said court, this day of, 19..

[SEAL.]

L.... M....
Clerk of said Court.

268. Defendant's undertaking to pay judgment (N. Dak. Rev. Codes sec. 5357).

[*Title of court and of cause.*]

WHEREAS the plaintiff above named has sued out a warrant of attachment against the defendant, C.... D..., in this action, by virtue of which the sheriff of county has levied upon [*or, is about to levy upon*] certain personal property of the defendant described as follows [*insert description of property*];

NOW, THEREFORE, we C.... D..., as principal, and E.... F.... and G.... H..., as sureties, hereby undertake, promise and agree to and with the said plaintiff that the said defendant will pay any judgment which the plaintiff may obtain against him in said action.

Signed, sealed and delivered
in presence of:

C.... D....
E.... F....
G.... H....

W.... X....
Y.... Z....

[*Acknowledgment and justification of sureties as in Form 266.*]

269. Defendant's undertaking that property shall be forthcoming (N. Dak. Rev. Codes sec. 5357).

[Proceed as in Form 268 up to and including the description of the property attached, and continue as follows]:

NOW, THEREFORE, we, C.... D...., as principal, and E.... F.... and G.... H...., as sureties, hereby undertake, promise and agree to and with the said plaintiff in the sum of dollars *[the amount must be equal to the value of the property according to the sheriff's inventory]* that the said property of the said defendant which has been *[or, is about to be]* attached shall be forthcoming in substantially as good condition as it is at the time of giving this undertaking, to answer any judgment which the plaintiff may obtain against the defendant in this action.

Signed, sealed and delivered
in presence of:

C.... D....
E.... F....
G.... H....

W.... X....
Y.... Z....

[Acknowledgment and justification as in Form 266.]

270. Notice of attachment of real estate or bulky personal property, to be recorded in office of register of deeds (N. Dak. Rev. Codes sec. 5362).

[Title of court and of cause.]

NOTICE is hereby given that an action has been commenced by the above named plaintiff against the above named defendant, and a warrant of attachment issued therein, in which the amount of plaintiff's claim is stated to be the sum of dollars, and by virtue thereof and of the statute in such case made and provided I file this notice as a levy upon the following described real *[or, personal]* property situated in the county of in said state, to-wit, *[here insert an accurate description of the real estate or personal property attached]*.

L.... M....,

Sheriff of County, North Dakota.

271. The same, to be served on the occupant or person in possession thereof (N. Dak. Rev. Codes sec. 5364).

[Title of court and of cause.]

To E.... F....

SIR: Take notice that I have this day of, 19..., under and by virtue of a writ of attachment duly and regularly issued by the district court within and for county, state

of North Dakota, on the day of, 19.., in an action therein pending, wherein A.... B.... is plaintiff and C.... D.... is defendant, * attached certain personal property belonging to said C.... D.... and held in your possession, described as follows [*here insert accurate description of the property attached*].

[*If the property attached be real estate insert after **]: attached that certain parcel of real estate belonging to the said C.... D.... which you now occupy, described as follows [*here insert accurate description of real estate*].

Given under my hand this day of, 19..

L.... M....,

Sheriff of County, North Dakota.

272. Plaintiff's indemnifying undertaking to sheriff (N. Dak. Rev. Codes sec. 5365).

[*Title of court and of cause.*]

WHEREAS the plaintiff above named has sued out a warrant of attachment against the defendant C.... D.... in this action, by virtue of which the sheriff of county has levied upon and seized certain personal property described as follows [*here insert description of property*]; and whereas it is claimed by E.... F.... that said property is not the property of the defendant C.... D...., but that the said E.... F.... has the title thereto and the right to possession thereof; and whereas the said E.... F.... has made affidavit of his title to said property stating the value thereof and the ground of such title, and has demanded that the said sheriff release such levy;

NOW, THEREFORE, we, A.... B...., as principal, and G.... H.... and J.... K...., as sureties, hereby undertake, promise and agree to and with the said sheriff of county that we will at all times indemnify the said sheriff against the said claim of the said E.... F.... and will save and hold harmless the said sheriff from all damages, costs and charges of any nature incurred or suffered by him by reason of his levy upon said property and by reason of his holding the said property and disposing of the same under the said writ of attachment.

Signed, sealed and delivered
in presence of:

A.... B....
G.... H....
J.... K....

W.... X....
Y.... Z....

[*Acknowledgment and justification of sureties as in Form 266.*]

273. Undertaking to obtain release of partnership property when the interest of one partner only is seized (N. Dak. Rev. Codes sec. 5373).

[*Title of court and of cause.*]

WHEREAS the plaintiff above named has sued out a warrant of attachment against the defendant, C.... D...., in this action, by virtue of which the sheriff of county has levied upon certain personal property described as follows [*here insert description of property*]; and whereas it appears by the affidavit of one E.... F.... [*or, if other affidavits have been filed upon the hearing, recite them*] that the property so levied upon is the property of the firm composed of the said C.... D.... and E.... F.... and that the interest of one of said partners, to-wit, C.... D...., only has been levied upon; and whereas the said E.... F.... has made application to the court for an order to discharge the said attachment as to said personal property;

NOW, THEREFORE, we, E.... F...., as principal, and G.... H.... and J.... K...., as sureties, hereby undertake, promise and agree to and with the said sheriff, in the sum of dollars [*the amount of the undertaking is to be fixed by the court or judge*] that they will pay to the said sheriff on demand the amount of the interest of the said C.... D.... in the said partnership property if judgment shall be rendered in the above entitled action in favor of the plaintiff and against the said defendant, the amount of such interest to be determined by reference or otherwise, as the court may direct.

Signed, sealed and delivered
in presence of:

E.... F....
G.... H....
J.... K....

W.... X....
Y.... Z....

[*Acknowledgment and justification of sureties as in Form 266.*]

274. Affidavit for attachment (S. Dak. Rev. Codes C. P. sec. 207).¹⁰

[*Caption as in Form 5.*]

[*Venue.*]

A.... B.... being duly sworn says that he is the plaintiff in the above entitled action [*or, that he is the agent of the plaintiff in the above entitled action and makes this affidavit on behalf of said plaintiff and is thereunto duly authorized*]; that C....

¹⁰ The affidavit may be made by an agent who states in the affidavit that he is the agent of the plaintiff duly authorized, and

makes the same in plaintiff's behalf. *Hardenbery v. Roberts*, 6 S. Dak. 487 s.c. 61 N. W. 1128.

D...., the defendant above named, is justly indebted to the said plaintiff in the sum of dollars and cents, over and above all discounts and set-offs, which said sum is now due; and that a cause of action exists therefor in favor of said plaintiff and against said defendant amounting to the said sum of dollars, the grounds of which are as follows [*set forth specifically the grounds of the cause of action*]; that the defendant, C.... D...., is not a resident of this state [*or state any other ground of attachment as contained in the statute, S. Dak. Rev. Codes C. P. sec. 207; if more than one ground is stated they must be stated conjunctively*].

A.... B....

[*Jurat.*]

275. Undertaking for attachment (S. Dak. Rev. Codes C. P. sec. 208).

[*Title of court and of cause.*]

WHEREAS A.... B...., the plaintiff above named, has commenced an action by summons for the recovery of money against C.... D...., defendant, and has made [*or, is about to make*] application for a warrant of attachment against the property of said C.... D...., defendant, as security for the satisfaction of such judgment as the plaintiff may recover in said action;

NOW, THEREFORE, if C.... D...., the defendant, recover judgment against the said plaintiff in said action, or if the attachment therein be set aside by order of the court, we, E.... F.... and G.... H.... do hereby undertake and agree to and with the said defendant that the said plaintiff will pay all costs that may be awarded to the said defendant, and all damage he may sustain by reason of the said attachment, not exceeding the sum of dollars.

Dated the day of, 19..

E.... F....
G.... H....¹¹

[*Venue.*]

On this day of, 19.., before me, a justice of the peace in and for said county and state, personally appeared E.... F.... and G.... H...., known to me to be the person described in and who executed the within and foregoing instrument and acknowledged to me that they executed the same.

L.... M....
Justice of the Peace.

¹¹ It is not necessary that the undertaking be signed by the plaintiff. B. H. M. Co. v. Gardiner, 5 S. Dak. 246 s.c. 58 N. W. 557.

[Venue.]

E.... F.... and G.... H.... being each duly sworn, each for himself says that he is the surety in the within bond; that he is a resident and freeholder of said state and worth the sum of dollars specified in the within bond, over and above his debts and liabilities, and exclusive of his property exempt from execution.

Subscribed and sworn to before me
this.... day of, 19..

E.... F....
G.... H....

L.... M....
Justice of the Peace.

I find the sureties in the within undertaking sufficient, and do approve and allow the same.

O.... P....
Clerk of the Circuit Court,
..... County, S. Dak.

276. Writ of attachment (S. Dak. Rev. Codes C. P. sec. 209).

[Title of court and of cause.]

THE STATE OF SOUTH DAKOTA to
the sheriff of the County of

Greeting:

WHEREAS an application has been made to this court for a warrant of attachment against the property of C.... D...., defendant, in an action in the court of said county, wherein A.... B.... is plaintiff and C.... D.... is defendant;

AND WHEREAS the affidavit of A.... B...., presented on such application states that a cause of action upon contract for the recovery of money exists against said defendant in favor of said plaintiff, and that the sum of dollars is due from the said defendant to said plaintiff upon [*here state the nature of the demand*], which constitutes the said plaintiff's demand against the defendant in said action; and that said defendant [*here state one or more of the statutory grounds for attachment*]; and that the plaintiff is entitled to said warrant of attachment, according to the provisions of the Revised Code of Civil Procedure, and he having given the undertaking required by the provisions of the aforesaid Code of Civil Procedure;

NOW, you are hereby commanded and required to attach and safely keep all the property of said defendant not exempt from execution within your county, or so much thereof as may be sufficient to satisfy the plaintiff's demand above stated, together with costs and expenses, as security for the satisfaction of such judg-

ment as said plaintiff may recover in said action; unless the defendant give you security by the undertaking of at least two sufficient sureties, in an amount sufficient to satisfy said plaintiff's demand, besides costs, or in an amount equal to the value of the property which has been or is about to be attached, in which case you will take such undertaking; and when this warrant shall be fully executed or discharged, you are required to return the same, with your proceedings thereon, to this court.

WITNESS the Hon. O.... P...., Judge of the said court of county, at, this day of, 19..

Q.... R....

[SEAL OF COURT.]

Clerk of Court,
..... County.

**277. Claim of ownership of attached property by third person
(S. Dak. Rev. Codes C. P. secs. 214, 343).**

[*Title of court and of cause.*]

PLEASE TAKE NOTICE that the black horse [*or describe particularly the property claimed*] this day attached by you in the above entitled action is claimed by O.... P...., of, as his property, and is not the property of the defendant in the above entitled action.

Dated, 19..

O.... P....

[*or, L.... M...., Attorney for O.... P....*].

[*Give residence and address.*]

278. Notice of third person's claim to be given by sheriff to plaintiff (S. Dak. Rev. Codes C. P. secs. 214, 343).

[*Title of court and of cause.*]

TAKE NOTICE that O.... P.... makes claim to the property levied upon by me [*or if the claim covers only specific articles, describe them*] under the attachment issued out of the court against the property of C.... D.... in the above entitled action, and that I shall proceed to try the claim of the said O.... P.... before a jury to be summoned by me for that purpose at, on the day of, 19..

Dated, 19..

L.... M....

Sheriff of County.

To A.... B....,

E.... F...., and G.... H....

[*To claimant, and to attorneys for
plaintiff and defendant.*]

279. Oath to jurors upon trial of claim (S. Dak. Rev. Codes C. P. secs. 214, 343).

You and each of you do solemnly swear that you will well and truly try the claim of O.... P.... to the property levied on by the sheriff of county, under the attachment in favor of A.... B.... against C.... D...., and true inquisition make according to the evidence, so help you God.

280. Oath to witness upon trial of claim (S. Dak. Rev. Codes C. P. secs. 214, 343).

You do solemnly swear that the evidence which you shall give to the jury touching the claim of O.... P.... to the property levied on by the sheriff of county under the warrant of attachment in favor of A.... B.... against C.... D.... shall be the truth, the whole truth and nothing but the truth, so help you God.

281. Verdict of jury upon the trial of claim (S. Dak. Rev. Codes C. P. secs. 214, 343).

[Title of court and of cause.]

The undersigned, being a jury summoned and sworn by the sheriff of county, to try the claim of O.... P.... to the property levied on by the said sheriff under the attachment herein in favor of A.... B.... against C.... D...., to-wit [*specifying the property*], do upon our oaths say that the title to the said property was [*or, was not*] in the said O.... P.... at the time of said levy.

In testimony whereof we have hereunto set our hands and seals this day of, 19..

[Signatures and seals of jurors.]

282. Indemnifying undertaking by plaintiff after adverse verdict by sheriff's jury (S. Dak. Rev. Codes C. P. secs. 214, 343).

[Title of court and of cause.]

WHEREAS an attachment has been issued in the above entitled action in favor of the above named plaintiff, A.... B...., against the property of the above named defendant, C.... D...., under which L.... M...., sheriff of the county of, has attached and taken into his custody certain goods and chattels [*specifying them*]; and whereas O.... P...., of, claims the same, and a jury has by its inquisition found the said property in said claimant;

NOW, THEREFORE, E.... F...., of the city of and county of, state of, merchant, and G....

H...., of the town of, county of, and state aforesaid, farmer, do hereby jointly and severally undertake and agree, pursuant to the statute, to indemnify the said sheriff for the detention thereof and hold him, the said sheriff, harmless from all damages, costs and charges resulting from the said taking and detention of said property.

Dated, 19..

E.... F....

G.... H....

[*Acknowledgment and justification as in Form 275.*]

283. Undertaking by defendant to discharge attachment (S. Dak. Rev. Codes C. P. sec. 222).

[*Title of court and of cause.*]

An attachment having been issued in the above action to the sheriff of the county of and the above named defendant having appeared in such action, and being about to apply for an order to discharge the same, we, E.... F.... and G.... H...., of, in the said county of, do hereby, pursuant to the statute in such case made and provided, undertake in the sum of dollars,¹² that we will, on demand, pay to the above named plaintiff the amount of the judgment which may be recovered against the above named defendant in this action, not exceeding the above mentioned sum.

Dated, 19..

E.... F....

G.... H....

[*Venue.*]

On this day of, 19.., before me, a justice of the peace in and for said county and state, personally appeared E.... F.... and G.... H...., known to me to be the persons who are described in and who executed the within and foregoing instrument, and acknowledged to me that they executed the same.

Y.... Z...., Justice of the Peace.

[*Venue.*]

E.... F.... and G.... H.... being severally sworn, each for himself says that he is a freeholder [*or, householder*] of the county of in this state, and that he is worth the sum of dollars over and above all his debts and liabilities and exclusive of all property exempt from levy and sale on execution.

E.... F....

G.... H....

[*Jurat.*]

I certify that I find the sureties in the foregoing undertaking sufficient, and do approve and allow the same.

O.... P.... Clerk, &c.

¹² The penal sum of the undertaking must be at least double the sum claimed by the plaintiff. S. Dak. Rev. Codes C. P. sec. 222.

284. Affidavit for discharge of attachment on partnership property attached in an action against one partner alone (S. Dak. Rev. Codes C. P. sec. 224).

[*Title of court and of cause.*]

[*Venue.*]

E.... F.... being first duly sworn says that the above entitled action has been duly commenced and is now pending in this court, and that on the day of, 19.., a writ of attachment was duly issued out of this court in the said action, under and by virtue of which writ the sheriff of the said county of did on the day of, 19.., seize and levy upon the following described personal property [*here insert description of property attached*]; that at the time said property was so seized the same was and still is partnership property belonging to the firm of [*insert name of firm*] which firm was then and still is composed of this affiant and the defendant C.... D....; that the property so levied upon is worth the sum of dollars, and that the interest of the defendant C.... D.... in said property is worth not exceeding the sum of dollars.¹³

WHEREFORE this affiant makes this affidavit for the purpose of applying to the court for an order discharging the said attachment upon the said partnership property, upon the giving of an undertaking in accordance with the terms of section 224 of the Revised Code of Civil Procedure of South Dakota.

E.... F....

[*Jurat.*]

285. Undertaking for discharge of attachment on partnership property (S. Dak. Rev. Codes C. P. sec. 224).

[*Title of court and of cause.*]

A warrant of attachment having been issued in the above entitled action to the sheriff of the county of, and one E.... F...., of, in said county having made affidavit that the property heretofore seized by the sheriff in this action, described as follows [*here insert description of the property attached*], was at the time of such seizure and still is partnership

¹³ The amount of the undertaking is to be fixed by the court or the judge to whom the application is made, and it must not be less than the value of the interest of the defendant in the partnership goods attached, and the court or judge is authorized to hear affi-

davits or oral testimony respecting the value of such interest. If there be likelihood of dispute as to the value, additional affidavits from third persons showing the value thereof should be attached to the foregoing affidavit.

property belonging to the defendant, C.... D...., and said E.... F.... as copartners, and having made application for an order discharging the said attachment as to said personal property upon giving the undertaking required by the statute in such case, and the said court after the hearing of testimony and having fixed the amount of said undertaking at the sum of dollars;

We, E.... F...., as principal, and G.... H.... and J.... K...., as sureties, all of, in said county of, state of South Dakota, do hereby, pursuant to the statute in such case made and provided, undertake in the sum of dollars that if judgment shall be rendered in this action in favor of the plaintiff we will pay to the said sheriff on demand the amount of the defendant's interest in such partnership property, which amount is to be determined by reference or otherwise, as the court may direct.

Dated, 19..

E.... F....

G.... H....

J.... K....

[Add acknowledgment and justification of sureties and approval as in Form 283.]

286. Affidavit for attachment (Cobbey's Ann. Stats. of Nebr. secs. 1171, 1172).

[Caption as in Form 6.]

[Venue.]

A.... B.... being first duly sworn says that he is the plaintiff [or, the agent, or, attorney of the plaintiff] in the above entitled action, and [if affidavit is made by agent or attorney] makes this affidavit on behalf of said plaintiff; deponent further says that the claim in this action is for [here state the general nature of the plaintiff's claim, as, goods and merchandise heretofore sold and delivered by the plaintiff to the defendant to the amount of dollars, as more fully appears in the petition on file herein], and that the said claim is just, and that plaintiff ought, as this deponent believes, to recover thereon the sum of dollars, which is the amount of plaintiff's claim.*

Deponent further states that said defendant is a non-resident of the state of Nebraska [or state any other cause of attachment contained in section 1171, Cobbey's Annotated Statutes of Nebraska; if two or more grounds are stated they should be stated conjunctively].

A.... B....

[Jurat.]

287. Affidavit for attachment on debt not due (Cobbey's Ann. Stats. of Nebr. sec. 1216).

[*Begin as in Form 286, continuing down to *, and then insert*]: that the said claim will become due on the day of, 19.., and deponent further states that [*here insert one of the grounds of attachment contained in section 1216, Cobbey's Annotated Statutes of Nebraska, and conclude with signature and jurat*].

288. Order granting attachment on claim not due (Cobbey's Ann. Stats. of Nebr. sec. 1217).¹⁴

[*To be entered on court journal*]:

Now on this day, upon application of the plaintiff, A.... B...., and it appearing from the affidavit of E.... F...., an attorney of record of said plaintiff in said case, that the claim of A.... B.... is just and that there is cause for granting an attachment in the sum of dollars and dollars probable costs in the case, an attachment is therefore allowed to issue in this case, upon the plaintiff giving an undertaking for the sum of dollars, with approved security, as required by law.

G.... H...., Judge.

289. Undertaking for writ of attachment (Cobbey's Ann. Stats. of Nebr. sec. 1173).

[*Title of court and of cause.*]

[*Venue.*]

I, E.... F.... [*or, we, E.... F.... and G.... H....*], do hereby bind myself [*or, ourselves*] to the defendant, C.... D...., that the plaintiff above named shall pay to the said defendant all damages, not exceeding the sum of dollars, which he may sustain by reason of the attachment in this action, if the order therefor be wrongfully obtained.

E.... F....

[*Or, E.... F.... and G.... H....*]

The foregoing recognizance taken and sureties thereon approved by me this day of, 19..

L.... M....

Clerk of Court of County, Nebr.

[*Venue.*]

E.... F.... and G.... H.... being each duly sworn, each for himself says that he is a resident of the aforesaid county and state; that he is one of the sureties in the foregoing under-

¹⁴ See *Cox v. Peoria Mfg. Co.*, 42 Nebr. 660, s.c. 60 N. W. 933.

taking; that he is worth in real estate therein situated the sum of dollars beyond the amount of his debts, and that he has property liable to execution in the state of Nebraska equal to the sum of dollars.

E.... F....

G.... H....

[*Jurat.*]

290. Order of attachment (Cobbey's Ann. Stats. of Nebr. sec. 1174).

[*Title of court and of cause.*][*Venue.*]

To the Sheriff of said County:

WHEREAS A.... B.... has filed the necessary affidavit to obtain an order of attachment against C.... D.... in an action now pending in the district court of county, wherein A.... B.... is plaintiff and C.... D.... is defendant, to recover of the defendant the sum of dollars;

THEREFORE you are commanded to attach the lands, tenements, goods, chattels, stocks or interest in stocks, rights, credits, moneys and effects of the defendant in your county not exempt by law from being applied to the payment of the plaintiff's claim, or so much thereof as will satisfy the plaintiff's claim of dollars and the probable costs of this action not exceeding fifty dollars.

You will make due return of this order on the day of, 19..

[SEAL.] WITNESS my hand and the seal of this court this day of, 19..

E.... F....

Clerk of District Court.

291. Inventory and appraisement of attached property (Cobbey's Ann. Stats. of Nebr. sec. 1178).

[*Title of court and of cause.*][*Venue.*]

L.... M...., the sheriff of county, having first duly sworn G.... H.... and J.... K...., two residents of said county, to make a true inventory and appraisement of all property attached as the property of C.... D...., the defendant, on an order of attachment issued in the foregoing action.

NOW, THEREFORE, we, G.... H.... and J.... K...., two residents, and L.... M...., sheriff of said county, do make the following inventory and appraisement of the property at-

tached by said sheriff in this action, viz: [*insert itemized description of property attached, with values*].

Given under our hands this day of, 19..

G.... H....

J.... K...., Appraisers.

L.... M...., Sheriff.

292. Undertaking by defendant to perform judgment (Cobey's Ann. Stats. of Nebr. secs. 1192, 1193).

[*Title of court and of cause.*]

[*Venue.*]

We, E.... F.... and G.... H...., residents of county, Nebraska, do hereby undertake and bind ourselves to the plaintiff, A.... B...., as sureties that the above named defendant, C.... D...., shall perform the judgment of the court in this action and pay the plaintiff's said judgment, not exceeding the sum of dollars. [*This sum must be double the amount of the plaintiff's claim, as stated in the affidavit for attachment.*]

Dated, 19..

E.... F....

G.... H....

The foregoing undertaking and the sureties thereon approved this day of, 19..

By the Court:

J.... K...., Judge.

[*Add justification of sureties as in Form 289.*]

CHAPTER XI.

GARNISHMENT.

- | | |
|---|---|
| <p>293. Affidavit in garnishment before judgment (Wisconsin).</p> <p>294. The same, when joint liability is claimed (Wisconsin.)</p> <p>295. Affidavit in garnishment in aid of execution (Wisconsin).</p> <p>296. Garnishee summons (Wisconsin).</p> <p>297. Garnishee's answer denying all liability (Wisconsin).</p> <p>298. Garnishee's answer stating facts and submitting liability to court (Wisconsin).</p> <p>299. Garnishee's answer showing a liability not subject to garnishment (Wisconsin).</p> <p>300. Garnishee's answer by way of interpleader (Wisconsin).</p> <p>301. Order interpleading claimant (Wisconsin).</p> <p>302. Notice of election to take issue on garnishee's answer (Wisconsin).</p> <p>303. Undertaking for release of garnishee (Wisconsin).</p> <p>304. Verdict of jury against garnishee (Wisconsin).</p> <p>305. Finding of court in favor of garnishee (Wisconsin).</p> <p>306. Judgment in favor of garnishee for costs (Wisconsin).</p> <p>307. Finding against garnishee (Wisconsin).</p> <p>308. Judgment against garnishee (Wisconsin).</p> <p>309. Affidavit in garnishment (Minnesota).</p> <p>310. Summons to garnishee (Minnesota).</p> | <p>311. Notice of garnishment to defendant (Minnesota).</p> <p>312. Return of service (Minnesota).</p> <p>313. Bond for release of property garnished (Minnesota).</p> <p>314. Order discharging garnishment, to be endorsed upon the bond (Minnesota).</p> <p>315. Plaintiff's direction to sheriff to take answer of garnishee, to be endorsed upon writ of attachment (Iowa).</p> <p>316. Notice to garnishee (Iowa).</p> <p>317. Notice of garnishment to defendant (Iowa).</p> <p>318. Notice to garnishee upon execution (Iowa).</p> <p>319. Questions to be propounded by sheriff to garnishee (Iowa).</p> <p>320. Notice to garnishee to show cause why execution should not issue (Iowa).</p> <p>321. Affidavit in garnishment (North Dakota).</p> <p>322. Summons in garnishment (North Dakota).</p> <p>323. Affidavit against garnishee in aid of attachment (Nebraska).</p> <p>324. Affidavit for garnishee summons in aid of execution (Nebraska).</p> <p>325. Notice to garnishee in attachment (Nebraska).</p> <p>326. Summons in garnishment in aid of execution (Nebraska).</p> <p>327. Undertaking by garnishee to retain property or money (Nebraska).</p> |
|---|---|

As garnishment is a provisional remedy which is created by statute, the statute must in all cases be strictly followed. The statutes in the various states covered by this work differ very

greatly in their provisions, save that in Wisconsin and North Dakota the procedure is practically identical. In South Dakota there seem to be no provisions authorizing garnishment proceedings in courts of record.

293. Affidavit in garnishment before judgment (Wis. Stats. 1898 sec. 2753).

STATE OF WISCONSIN,
..... Court County.

A.... B....,	} Plaintiff, vs. Defendant, Garnishee.
C.... D....,	
E.... F....,	

[*Venue.*]

A.... B.... being duly sworn, says that he is the plaintiff above named [*or, the agent of the above named plaintiff and makes this affidavit on his behalf*]; that a summons has been issued in the above entitled action; that the same is an action to recover damages founded upon [*state the nature of the cause of action, which must be one named in section 2731 Wis. Stats. 1898*]; that the amount of the said plaintiff's claim against the above named defendant is dollars and cents over and above all offsets; that this affiant verily believes that * E.... F.... is indebted to and has property, real or personal, in his possession and under his control ** belonging to the defendant C.... D...., and that such indebtedness and property are, to the best of the knowledge and belief of this affiant, not by law exempt from seizure or sale upon execution.

A.... B....

Subscribed and sworn to before me
this day of, 19..

J.... K...., Notary Public.

294. The same, when joint liability is claimed (Wis. Stats. 1898 sec. 2753).

[*Proceed as in Form 293, but insert between * and ***]: E.... F.... and G.... H.... jointly are indebted to and have property, real or personal, in their possession or under their control.

295. Affidavit in garnishment in aid of execution (Wis. Stats. 1898 sec. 2753).

[Caption as in Form 293.]

[Venue.]

A.... B.... being duly sworn says that he is the plaintiff above named [or, the agent of the plaintiff above named] and that the defendant above named is indebted to said plaintiff in the sum of dollars, over and above all offsets, upon a judgment duly rendered in this court on the day of, 19.., in favor of the plaintiff and against the said defendant, for dollars and cents, damages and costs; and that said sum and interest on said judgment since the date of rendition of said judgment is the amount of his claim;

That on the day of, 19.., an execution was duly issued out of said court upon said judgment to the sheriff of county against the property of said defendant, and that said execution is returnable on the day of, 19.., and has not been returned, but is still in said sheriff's hands unsatisfied;

That the affiant verily believes that [*here proceed as in Form 293 from **].

296. Garnishee summons (Statutory form: Wis. Stats. 1898 sec. 2754).

[Caption as in Form 293.]

THE STATE OF WISCONSIN to

the said Garnishee [and each of them].

YOU ARE HEREBY SUMMONED, pursuant to the annexed affidavit, as garnishee of the defendant, C.... D...., and required, within twenty days after the service of this summons upon you, exclusive of the day of service, to answer according to law whether you are indebted to, or have in your possession or under your control any property, real or personal, belonging to such defendant, and to serve a copy of your answer on the undersigned, at, in the county of; and in case of your failure so to do you will be liable to further proceedings according to law. Of which the said defendant will also take notice.

L.... M...., Plaintiffs Attorney.

P. O. Address, ... County, Wis.

297. Garnishee's answer denying all liability (Statutory form: Wis. Stats. 1898 sec. 2759).

[Caption as in Form 293.]

[Venue.]

E.... F.... being first duly sworn, says that on the day of, 19.., he was served with a garnishee summons in the

above entitled action; that he was then and is now in no manner and upon no account whatever indebted or under liability to the defendant C.... D...., and that he then had and has now in his possession, or under his control, no real estate and no personal property, effects or credits of any description whatever, belonging to said defendant or in which he has any interest; and is in no manner liable as garnishee in this action.

E.... F....

Subscribed and sworn to before me
this day of, 19..

J.... K...., Notary Public.

298. Garnishee's answer stating facts and submitting liability to court (Wis. Stats. 1898 sec. 2760).

[Caption as in Form 293.]

[Venue.]

E.... F.... being duly sworn says that he was served with a garnishee summons in the above entitled action on the day of, 19.. That affiant was then and is now in no manner and upon no account indebted to or under liability to the defendant unless an indebtedness or liability exist under the following facts and circumstances, to-wit [*here state fully and succinctly the facts upon which the question of liability depends*].

And affiant further says that he had at the time of the service of said summons and now has in his possession or under his control no real estate and no personal property, effects or credits of any description whatever belonging to the said defendant or in which he has any interest.

E.... F....

[Jurat.]

299. Garnishee's answer showing a liability not subject to garnishment (Wis. Stats. 1898 sec. 2769).

[Caption as in Form 293.]

[Venue.]

E.... F.... being duly sworn says that he was served with a garnishee summons in the above entitled action on the day of, 19.., and that he was then and is now in no manner and upon no account indebted to or under any liability to said defendant except upon a certain negotiable promissory note executed and delivered by affiant to said defendant on or about, 19.., for the sum of dollars payable after date, with interest, which note is still due and unpaid. [*Or state fully any other facts showing that the liability of the garnishee to the defendant is one of the liabilities named in Wis.*

Stats. 1898 sec. 2769, and hence not subject to garnishment.]
And affiant submits that he is not liable as garnishee upon such indebtedness.

And affiant further says that at the time of the service of the said garnishee summons he had and now has in his possession and under his control no real estate and no personal property, effects or credits of any description whatever belonging to said defendant or in which he has any interest, and is in no manner liable as garnishee in this action.

E.... F....

[*Jurat.*]

300. Garnishee's answer by way of interpleader (Wis. Stats. 1898 sec. 2767).

[*Caption as in Form 293.*]

[*Venue.*]

E.... F.... being duly sworn says that he was served with a garnishee summons in the above entitled action on the day of, 19.., and that he was then and is now in no manner and upon no account whatever indebted or under liability to the defendant C.... D.... and that he had then and now has in his possession or under his control no real estate and no personal property, effects or credits of any description whatever belonging to said defendant or in which he has any interest, except it be as hereinafter alleged, and that he is in no manner liable as garnishee in this action unless it be upon the facts and circumstances hereinafter stated, upon which he respectfully submits the question to the court, to-wit:

The affiant admits that he is indebted in the sum of dollars upon [*here state the nature of the indebtedness*] and the defendant makes claim that the said sum is due to him from the affiant and that one [*name the claimant*] who resides at [*give residence*] also makes claim that the said sum is due from this affiant unto him.

Affiant further states that he has in his possession and under his control the following described personal property [*insert description*] and that the defendant, C.... D...., and one [*name claimant*] who resides at [*residence*] each make claim to said property.

That the affiant is not in collusion with either, and is unable to determine which of said claimants is entitled to said property, and makes this affidavit as an answer to said garnishment and also for the purpose of a motion that said [*name claimant*] be interpleaded as a defendant in this garnishee action, and that affiant may pay said sum and deliver said property into court

and have a receipt therefor and be thereby discharged from all liability to any of the parties for the same.

E.... F....

[*Jurat.*]

301. Order interpleading claimant (Wis. Stats. 1898 sec. 2767).

AT A GENERAL [*or*, SPECIAL TERM of the Circuit Court in and for County, State of Wisconsin, begun and held at the Court House in the City of in said County, and on the day of, 19..

PRESENT, Hon. J.... K...., Circuit Judge, Presiding.

A.... B....,	}
Plaintiff,	
vs.	
C.... D....,	
Defendant,	
E.... F....,	
Garnishee.	

On reading and filing the affidavit of E.... F...., garnishee in this action, and on motion of J.... K...., attorney for said garnishee;

ORDERED that [*name of claimant*] be interpleaded as defendant in this garnishee action.

That notice thereof setting forth the facts on which this order is based be served on said claimant so interpleaded, with a copy of this order, such notice to be subscribed by the plaintiff's attorney.

That after service of such notice with a copy of this order the said garnishee pay to the clerk of this court the sum of dollars, the amount claimed by the defendant in the action and also by said claimant, and that the clerk give him a receipt therefor which shall be a complete discharge of said garnishee from all liability to any party for the amount so paid; and that the amount so paid be held by the clerk subject to the further order of the court.

That such notice, with a copy of this order, be served on the said claimant so interpleaded by delivering a copy of said notice and order to the said claimant and leaving the same with him personally. [*The notice with a copy of the order are to be served in the manner required by law for the service of a summons, hence the order should require personal service in accordance with Wis. Stats. 1898 secs. 2636, 2637 and Laws 1903 c. 190, if possible; but if it be necessary to serve by publication as pro-*

vided for in section 2639 the order should so provide, and the forms given in Chapter VII should be followed in directing the manner of service.]

Dated, 19..

By the Court:

L.... M...., Circuit Judge.

**302. Notice of election to take issue on garnishee's answer
(Wis. Stats. 1898 secs. 2759-2763).**

[Caption as in Form 293.]

Sir:

Please take notice that the plaintiff in this action elects to take issue on the answer of E.... F...., garnishee herein, to the garnishee summons, and will maintain him to be liable as garnishee.

Dated at this day of, 19..

N.... O....,

To R.... S...., Esq.,

Plaintiff's Attorney.

Attorney for E.... F...., garnishee.

**303. Undertaking for release of garnishee (Wis. Stats. 1898
sec. 2771).**

[Caption as in Form 293.]

WHEREAS, E.... F.... has been summoned as garnishee of the defendant in the above entitled action; and whereas the said defendant desires to have said garnishment released in the manner provided by law;

NOW, THEREFORE, we, G.... H...., merchant, and J.... K...., farmer, both of in said county and state of Wisconsin, and freeholders in said state, do hereby undertake that we will, on demand, pay to the plaintiff in this action the amount of the judgment, with all costs, that may be recovered against such defendant in this action, not exceeding the sum of five hundred dollars. *[This sum must be not less than double the amount of the indebtedness as specified in the affidavit of garnishment, unless the court upon application directs a less sum.]*

Dated, 19..

G.... H....

In presence of:

J.... K....

L.... M....

O.... P....

[Venue.]

G.... H.... and J.... K.... being each duly sworn, each for himself says that he is a resident and freeholder within the state of Wisconsin; that he is worth the sum of five hundred dol-

lars in property within the state of Wisconsin over and above all his debts and liabilities and property exempt from execution.

Subscribed and sworn to before me
this day of, 19..

G.... H....
J.... K....

R.... S...., Notary Public.

[A copy of this undertaking, with notice of time and place of filing, must be served on the plaintiff, and the plaintiff may except to its sufficiency within three days thereafter, in which case the sureties must justify in like manner as bail upon arrest. Wis. Stats. 1898 secs. 2771, 2704, 2705, 2706, Laws 1903 c. 159].

304. Verdict of jury against garnishee (Wisconsin).

[Caption as in Form 293.]

WE, the jury impaneled and sworn to try the issue in this action between A.... B...., plaintiff, and E.... F...., garnishee, do find for the plaintiff: that the said E.... F.... is liable as garnishee; that at the date of the service of the garnishee summons herein the said garnishee was indebted to the said C.... D...., defendant, in the sum of dollars, and that said indebtedness was absolute and subject to garnishment; that the said garnishee also, at the date of such service, had property in his possession and under his control belonging to said defendant and liable to garnishment, to-wit *[here describe the property and find its value]*.

Dated, 19..

J.... K....
Foreman.

305. Finding of court in favor of garnishee (Wisconsin).

STATE OF WISCONSIN,
Circuit Court County.

At a general term of the circuit court for county, held at the court house in the city of, beginning, 19.., and on the day of of said term;

PRESENT: Hon. L.... M...., Circuit Judge, Presiding.

[Title of garnishee action.]

This action coming on to be tried upon the issue joined upon the answer of E.... F...., as garnishee, and the same having been tried by the court, a jury trial having been waived in open court; the court finds, as facts in said garnishee action, that the answer of said garnishee and all the statements therein contained are true.

And the court further finds as conclusions of law, that said E.... F.... is not liable as garnishee, and is entitled to judgment for costs.

Let judgment be entered accordingly.

By the Court:

L.... M.... Judge.

306. Judgment in favor of garnishee for costs (Wisconsin).

[*Caption and title as in Form 305.*]

This action being at issue between the plaintiff and E.... F...., garnishee, and having been tried at said term by the court, a jury trial having been duly waived; and the court having filed its findings, wherein it finds as facts that the answer of said garnishee is true, and as conclusions of law that said E.... F.... is not liable as garnishee, and ordered judgment accordingly [*or, and the jury having returned a verdict therein wherein it is found that, here insert substance of the verdict*]; and the court having ordered judgment for the garnishee upon such verdict;

Now, on motion of G.... H...., attorney for said garnishee,

IT IS CONSIDERED AND ADJUDGED that the said E.... F.... do have and recover of the said plaintiff, A.... B...., the sum of dollars, his costs as taxed and allowed herein.

By the Court:

J.... K...., Clerk.

307. Findings against garnishee (Wis. Stats. 1898 sec. 2766).

[*Caption as in Form 305.*]

The issue joined in this garnishee action coming on for trial at said term, and having been tried by the court, G.... H...., Esq., appearing for the plaintiff and J.... K...., Esq., appearing for the defendant, and L.... M...., Esq., appearing for said garnishee, I, the judge before whom said issue was tried, do find as MATTERS OF FACT in said garnishee action:

I. That at the time of the service of the garnishee summons on said garnishee, to-wit, the day of, 19.., the said garnishee was indebted to C... D...., the defendant in the principal action, in the sum of dollars, presently and absolutely due [*here state the consideration of the debt as*], for merchandise theretofore sold and delivered by defendant to said garnishee.

II. That said garnishee at the time of said service had in his possession and under his control the following described personal property and effects belonging to the said defendant, as bailee thereof, and with no lien or interest therein, to-wit, [*here describe the same and give its value*].

And as CONCLUSIONS OF LAW from said facts I find that the said E.... F.... is liable as garnishee to the plaintiff upon said indebtedness in the sum of dollars, and also that he is liable as such garnishee by reason of the said personal property in his hands, and that the plaintiff is entitled to have the said indebtedness paid and said property delivered over to be applied upon the judgment in his favor against said defendant.

And it appearing that the plaintiff has recovered judgment in the principal action against the defendant for the sum of dollars damages and costs, which judgment remains wholly unsatisfied, I further find that the plaintiff is entitled to JUDGMENT against said garnishee, adjudging:

1. That he is liable as garnishee aforesaid.
2. That he pay over to the sheriff of county the said indebtedness due to the defendant, to-wit, the sum of dollars and interest thereon from the day of, 19..., to be applied toward the satisfaction of said judgment against the defendant.
3. That he deliver over, within ten days after the service on him of a certified copy of this judgment, all the said personal property above described to the sheriff.
4. That said sheriff sell and dispose of the said property above described in the same manner as if levied upon execution, and make due return of such sale.
5. That the plaintiff recover his costs of this garnishee action, to be taxed, and have execution therefor.

[Add any other provisions necessary to protect the interests of all parties.]

By the Court:

R.... S...., Circuit Judge.

308. Judgment against garnishee (Wis. Stats. 1898 sec. 2766).

[Caption as in Form 305.]

This action having been tried before the court, J.... K...., Circuit Judge, presiding, and the court having filed its findings of fact and conclusions of law, which are of record;

And the plaintiff having recovered judgment against said defendant, C.... D...., in the principal action, for the sum of dollars, damages and costs, and the court having ordered and directed judgment as herein adjudged against said garnishee;

NOW, on motion of L.... M...., attorney for the plaintiff,

IT IS ORDERED AND ADJUDGED: 1. That the said E.... F...., garnishee, do forthwith deliver to the sheriff of county the said property in said findings described.

2. That the said sheriff, on receipt of said property, make sale thereof in the same manner as if seized upon execution, and apply the same upon the execution that may be issued in said principal action.

3. That said E.... F...., garnishee, pay over to the said sheriff, to be applied on said judgment against the defendant, C.... D...., the amount of his indebtedness to said C.... D...., to-wit, the sum of dollars, and interest thereon, from the day of, 19.., to the day of such payment, and that upon receipt thereof the sheriff apply the same towards the satisfaction of said judgment against said C.... D...., or so much thereof as may be necessary for that purpose.

4. That the said sheriff return any residue of the said property or indebtedness that may remain after satisfying said principal judgment, to the said garnishee [*or, defendant, as the court may have ordered*].

5. That said plaintiff, A.... B...., do have and recover of the said E.... F...., in addition to his liability as garnishee, the sum of dollars, his costs of this action, and that the plaintiff have execution therefor.

6. That said garnishee make the said delivery and payment as herein adjudged within ten days after the service on him of a certified copy of this judgment.

7. That the said garnishee be and is hereby acquitted and discharged from all demands by the said defendant, C.... D...., or his representatives, for all moneys, goods, effects and credits which he shall have paid, delivered or accounted for by force of this judgment.

By the Court:

O.... P...., Clerk.

309. Affidavit in garnishment (Minn. Rev. Laws 1905 sec. 4229).

STATE OF MINNESOTA,
County of

District Court.
.... Judicial District.

A.... B....,	}
Plaintiff,	
vs.	
C.... D....,	}
Defendant.	

[*Venue.*]

A.... B.... being duly sworn says that he is the plaintiff [*or, the agent or attorney for the plaintiff*] in the above entitled ac-

tion; that a summons has been issued in said action; that a cause of action exists therein in favor of said plaintiff and against said defendant for the recovery of money, as will more fully appear by the complaint of said plaintiff, which has been filed with the clerk of said court at said county of [or, that a judgment was on the day of, 19.., duly rendered in this court in the above entitled action in favor of the plaintiff and against the defendant for the sum of dollars, damages and costs, which judgment is still due and unpaid].

And deponent further says that he believes that one E.... F.... has property, money and effects in his hands and under his control belonging to the said defendant, C.... D...., in said action, and that said E.... F.... is indebted to said defendant, C.... D...., and that the value of said property and effects, and each of the same, exceeds the sum of twenty-five dollars, and the amount of said money exceeds the sum of twenty-five dollars, and the amount of said indebtedness exceeds the sum of twenty-five dollars.

A.... B....

[*Jurat.*]

[*The affidavit must not be in the alternative. Prince v. Heenan, 5 Minn. 347.*]

310. Summons to garnishee (Minn. Rev. Laws 1905 sec. 4231).

STATE OF MINNESOTA,
County of

District Court.
.... Judicial District.

A.... B....,	} Plaintiff,
vs.	
C.... D....,	
E.... F....,	
	Defendant,
	Garnishee.

THE STATE OF MINNESOTA to

E.... F...., the above named garnishee.

WHEREAS the affidavit of A.... B...., the above named plaintiff [or, the agent or attorney for the above named plaintiff], has been made and filed with the clerk of said court at his office in the said county, in an action therein pending, wherein the said A.... B.... is plaintiff and against C.... D...., defendant, stating that he believes that E.... F...., the garnishee above named has property, money and effects in his hands and

under his control belonging to the above named defendant, and that said garnishee is indebted to said defendant, and that the value of said property and effects, and each of the same, exceeds the sum of twenty-five dollars, and the amount of said money exceeds the sum of twenty-five dollars, and the amount of said indebtedness exceeds the sum of twenty-five dollars.

THEREFORE you, the said garnishee, are hereby required to appear before the said court [*or*, before G.... H...., clerk of the said court at his office, *or*, before the Hon. J.... K...., judge of said court, at his chambers] in the court house in the city of, in the county of and state aforesaid, on the day of 19...., at o'clock in the..... noon of that day, and then and there answer, under oath, such questions as may be put to you, the said garnishee, touching your indebtedness to said defendant and as to any property, money or effects of the defendant in your possession or under your control.

And if you neglect to appear at the time above specified, or within two hours thereafter, you will be defaulted and judgment will be rendered against you for the amount of the damages and costs recovered by the plaintiff in the action against the defendant.

Dated, 19..

L.... M....
Plaintiff's Attorney.

[*The above notice must be served personally on the garnishee not less than twenty days before the time fixed for the examination.*]

311. Notice of garnishment to defendant (Minn. Rev. Laws 1905 sec. 4231).

[*Caption as in Form 311.*]

To C.... D....,

the above named defendant.

TAKE NOTICE that the within garnishee summons was served by O.... P.... upon E.... F...., the above named garnishee, on the day of, 19.., at, in the county of and state aforesaid, by handing to and leaving with the said E.... F.... personally a true and correct copy of the same, and then and there tendering and paying to said garnishee his fees for one day's attendance and mileage, viz: \$.... And you are hereby required to appear and take part in the examination of said garnishee which is to take place at the time and place specified in the within garnishee summons.

Dated, 19..

L.... M....
Plaintiff's Attorney.

312. Return of service of garnishee summons.[*Venue.*]

O.... P.... being duly sworn deposes and says that on the day of, 19.., at the city of, in said county, he served the within summons upon the within named garnishee by handing to and leaving with him personally a true and correct copy thereof, and that he then and there paid to the said garnishee in advance the sum of \$.... his fees for one day's attendance and mileage; that on the day of, 19.., at the city of in said county he served upon the within named defendant a copy of the within summons, together with a notice to said defendant, of which the foregoing is a copy, by [*state manner of service*].

O.... P....

[*Jurat.*]**313. Bond for release of property garnished (Minn. Rev. Laws 1905 sec. 4256).**[*Caption as in Form 311.*]

KNOW ALL MEN by these presents that we, C.... D...., as principal, and G.... H.... and J.... K...., as sureties, are held and firmly bound unto A.... B...., the plaintiff in the above entitled action, in the sum of dollars lawful money of the United States, for which payment to the said A.... B...., his heirs, executors, administrators or assigns, we jointly and severally bind ourselves, and each of our heirs, executors and administrators, firmly by these presents.

THE CONDITION OF THIS OBLIGATION is such, that whereas A.... B...., the above named plaintiff, has garnished the money, property and effects of the said C.... D...., the above named defendant in the hands of E.... F...., the above named garnishee;

Now, therefore, if the said C..... D....., the above named defendant, shall pay any judgment which may be recovered against him in the original action to which this garnishee action is ancillary, or an amount thereon equal to the value of the money, property and effects so garnished, then this obligation shall be void; otherwise to remain in full force.

IN TESTIMONY WHEREOF we have hereunto set out hands and seals this day of, 19..

Signed, sealed and delivered
in presence of:

C.... D.... [Seal.]
G.... H.... [Seal.]
J.... K.... [Seal.]

W.... X....
Y.... Z....

[Venue.]

On this day of, 19.., before me, a notary public within and for said county, personally appeared C.... D...., G.... H.... and J.... K...., to me known to be the persons described in and who executed the foregoing instrument, and acknowledged that they executed the same as their free act and deed.

L.... M....
Notary Public,
.....County.

[Venue.]

G.... H.... and J.... K.... being each duly sworn, each for himself says that he is one of the sureties named in the within bond; that he is a resident and freeholder of the state of Minnesota and worth the amount of dollars, specified in the within bond, above his debts and liabilities and exclusive of his property exempt from execution.

G.... H....
J K....

[Jurat.]

I hereby approve the within bond and the sureties therein named.

Dated, 19..

O.... P....,
District Judge
[or, Court Commissioner].

[The penalty of the bond must be double the amount claimed in the complaint, and the justification and approval must be by the district judge or a court commissioner of the county where the proceedings are pending.]

314. Order discharging garnishment, to be endorsed upon the bond (Minn. Rev. Laws 1905 sec. 4256).

Upon the filing of the foregoing bond, which has been and is hereby approved, and upon proof of service of a copy of this order on E.... F...., garnishee herein, it is ordered that the garnishment of the money, property and effects of the defendant, C.... D...., in the hands of said E.... F...., which has heretofore been made in this action, be and the same is hereby discharged and the money, property and effects so garnished released therefrom.

O.... P....,
District Judge
[or, Court Commissioner].

315. Plaintiff's direction to sheriff to take answer of garnishee, to be endorsed upon writ of attachment (Iowa Code secs. 3935-3939).¹

To the Sheriff of County, Iowa.

You are hereby directed and required to take the answer of E.... F...., garnished herein in the manner provided by law, and attach said answer to your return upon the within writ of attachment.

Dated, 19..

A.... B....
Plaintiff.

316. Notice to garnishee (Iowa Code sec. 3935).

[Caption as in Form 6.]

To E.... F....

[If more than one are garnished, name all]:

You [and each of you] will take notice that you are hereby attached as garnishee in the above entitled action; and that you are forbidden to pay any debt due by you to the above named defendant, or hereafter to become due, and that you are required to retain possession of all the property of the said defendant now or hereafter being in your custody, or under your control, in order that the same may be dealt with according to law.

[Add the following if the sheriff be not directed to take garnishee's answer; it may also be added when the answer is taken if the presence in court of the garnishee is desired]:

And you are further notified to appear at the next term of said court on the first day thereof, to-wit, on the day of, 19.., at the court house in the city of, in said county and state, and then and there to answer such questions as may be propounded to you, or you will be liable to pay the entire judgment which the said plaintiff may obtain against the said defendant.

G.... H....,
Sheriff of County, Iowa.

¹ In Iowa garnishment is simply a form of attachment or a proceeding in aid of an execution, and is effected by the officer, who has a writ of attachment or the execution in his hands, serving a notice of garnishment upon such per-

sons as the plaintiff may direct. The answer of the garnishee may be taken by the officer if the plaintiff in writing so direct, or in default of such direction by the court on a day fixed in the notice. Iowa Code sec. 3935 *et seq.*

317. Notice of garnishment to defendant (Iowa Code sec. 3947).²

[*Title of court and of cause.*]

To C.... D...., the above named defendant:

You are hereby notified that E.... F.... has been heretofore attached as garnishee in said court in the above entitled cause, pursuant to which he has answered, and unless you appear on the first day of the next term of said court, commencing at, in said county and state, on the day of, 19.., and show cause if any you have why judgment should not be rendered condemning the property or debt in the hands of said garnishee belonging to you, as shown by the answer of the said garnishee, judgment will be rendered condemning said property or debt, and the same will be dealt with according to law for the use of said plaintiff.

G.... H....,
Sheriff of County, Iowa.

318. Notice to garnishee upon execution (Iowa Code secs. 3975, 3976).

[*Title of court and of cause.*]

[*Venue.*]

To E.... F....

You are hereby notified that you are attached as garnishee in a cause now determined in the court of county, in the state of Iowa, wherein A..... B.... was plaintiff, and C.... D.... was defendant, and that you are forbidden to pay any debt due by you to the said defendant, or hereafter to become due, and that you are required to retain possession of all property of the said defendant now or hereafter being in your custody or under your control, in order that the same may be dealt with according to law.

And you are further notified to appear on the first day of the next term of said court, commencing at, in said county, the day of, 19.., then and there to answer such interrogatories as may be propounded to you, or you will be liable to pay the entire judgment which the said plaintiff has obtained against the said defendant.

Dated this day of, 19..

L.... M....
Sheriff of County, Iowa.

² This notice is jurisdictional. It must be served at least ten days before judgment against the gar-

nishee, which cannot legally be entered in its absence. *Williams v. Williams*, 61 Iowa, 612.

319. Questions to be propounded by sheriff to garnishee (Statutory form: Iowa Code sec. 3939).

[*Title of court and of cause.*]

1. Are you in any manner indebted to the defendant in this suit, or do you owe him money, or property which is not yet due? If so, state the particulars.

ANSWER:

2. Have you in your possession or under your control any property, rights or credits of the said defendant? If so, what is the value of the same, and state all the particulars.

ANSWER:

3. Do you know of any debts owing to the said defendant, whether due or not due, or any property, rights or credits belonging to him and now in the possession or under the control of others? If so, state the particulars.

ANSWER:

[*The answer should be written in full below each question and the following oath appended*]:

[*Venue.*]

I, E.... F...., the garnishee in the above entitled action, do solemnly swear that the foregoing answers made by me are full, true and complete answers to the above questions touching wherein I have been attached as garnishee. So help me God.

E.... F....

[*Jurat.*]

320. Notice to garnishee to show cause why execution should not issue (Iowa Code sec. 3943).³

[*Title of court and of cause.*]

To E.... F...., Garnishee:

You are hereby notified that on the day of, 19.., you were adjudged liable as a garnishee to pay the judgment rendered by said court in favor of plaintiff and against C.... D.... for the sum of dollars; and you are hereby further notified to be and appear, before noon of the second day of the term 19.., of said court, which will commence on the day of, 19.., at the court house in in said county, and show cause why execution should not issue against your property to satisfy said judgment.

L.... M....

Attorney for Plaintiff.

³ In case of garnishee's failure to appear his default will be entered, but he is not required to pay until he is given opportunity

to show cause against the issuing of an execution. Iowa Code sec. 3943; *Lauefore v. Ottumwa W. P. Co.*, 53 Iowa 415 sc. 5 N. W. 574.

321. Affidavit in garnishment (N. Dak. Rev. Codes sec. 5383).⁴

State of North Dakota
County of

In the District Court
..... Judicial District.

A.... B....,	} Plaintiff,
vs.	
C.... D....,	
E.... F....,	
	Defendant,
	Garnishee.

[*Venue.*]

A.... B.... being duly sworn says that he is the plaintiff [*or, the agent, or, attorney of the plaintiff*] in the above entitled action and makes this affidavit in his own [*or, in said plaintiff's*] behalf; that said action is brought to recover damages upon [*here state the nature of the plaintiff's cause of action*] and that affiant verily believes that E.... F.... is indebted to and has property, real or personal, in his possession or under his control belonging to the said defendant, C.... D...., and that said defendant has not property in this state liable to execution sufficient to satisfy the plaintiff's demand, and that the indebtedness and property mentioned in this affidavit is, to the best of the knowledge and belief of affiant, not by law exempt from seizure or sale upon execution.

[*Jurat.*]

A.... B....

322. Summons in garnishment (N. Dak. Rev. Codes sec. 5384).

[*Caption as in Form 321.*]

THE STATE OF NORTH DAKOTA to the said Garnishee:

You are hereby summoned, pursuant to the annexed affidavit, as a garnishee of the defendant, C.... D...., and required within thirty days after the service of this summons upon you, exclusive of the day of service, to answer according to law whether you are indebted to or have in your possession or under your control any property, real or personal, belonging to such defendant, and to serve a copy of your answer on the undersigned at his office in, in the county of; and in case of your failure so to do you will be liable to further proceedings according to law; of which the said defendant will also take notice.

L.... M...., Plaintiff's Attorney,
P. O. Address: County, N. Dak.

⁴ Garnishment proceedings in North Dakota are governed by sections 5383 to 5402, inclusive, of the Revised Codes, which are in

323. Affidavit against garnishee in aid of attachment (Cobbey's Ann. Stats. of Nebr. sec. 1180).⁵

[Caption as in Form 6.]

[Venue.]

A.... B.... being first duly sworn says that he is the plaintiff [or, the agent, or, attorney of the plaintiff] in the above entitled action and makes this affidavit in his own [or, on said plaintiff's] behalf; that he has good reason to believe that E.... F...., within said county of, has property of the said defendant, C.... D...., in his possession, to-wit [*here fully describe the property*], and also that the said E.... F.... is indebted to said C.... D.... in an amount unknown to affiant.

A.... B....

Subscribed in my presence and sworn to
before me this day of, 19..

X.... Y....
Notary Public.

324. Affidavit for garnishee summons in aid of execution (Cobbey's Ann. Stats. of Nebr. sec. 1223).

[Caption as in Form 6.]

[Venue.]

A.... B.... being first duly sworn says that he is the plaintiff [or, the agent, or, attorney of the plaintiff] in the above entitled action and makes this affidavit on his own [or, on the said plaintiff's] behalf; that in the above entitled action the plaintiff recovered a judgment therein against the said defendant on the day of, 19..; that there is now due on said judgment the sum of dollars; that an execution issued on said judgment has been returned unsatisfied for want of sufficient property belonging to the said defendant whereof to levy

substance identical, with some unimportant changes in details, with the garnishment statutes of Wisconsin; hence it is not deemed necessary to insert any special forms here except the affidavit and summons. It will be noticed that the affidavit must contain the statement that the defendant has not sufficient property subject to execution to satisfy the plaintiff's demand, which statement is not required in Wisconsin.

⁵ Garnishment in Nebraska is simply a proceeding ancillary to an attachment or in aid of an execution which has been returned unsatisfied. If the garnishee suffer default, or if his disclosure be unsatisfactory, or if he fail to deliver the property and pay the money owing into court, or give an undertaking therefor, the plaintiff must proceed by independent action to enforce the garnishee's liability. Cobbey's Ann. Stats. of Nebr. secs. 1198, 1199.

and collect the same. 'And affiant further says that he has good reason to and does believe that E.... F...., in said county, has property of said defendant in his possession, to-wit [*here describe the property*], and is indebted to the said judgment debtor in an amount unknown to affiant.

A.... B....

Subscribed in my presence and sworn to
before me this day of, 19..

Notary Public.

X.... Y....

325. Notice to garnishee in attachment (Cobbey's Ann. Stats. of Nebr. secs. 1180, 1194).

[*Caption as in Form 6.*]

To E.... F....

You are hereby notified to appear in the district court of County, Nebraska, on the day of, 19.., then and there to answer under oath all the questions put to you touching the property of every description and credits of the defendant, C.... D...., in your possession or under your control, and disclose truly the amount owing by you to the said defendant, whether due or not. And this you shall not omit to do, under the penalty of the law.

Dated at, the day of, 19..

L.... M....,

Sheriff County, Nebraska.

326. Summons in garnishment in aid of execution (Cobbey's Ann. Stats. of Nebr. sec. 1224).

[*Caption as in Form 6.*]

[*Venue.*]

To the Sheriff of said County:

You are hereby commanded to summon E.... F.... to appear in the said district court of County, Nebraska, on the day of, 19.., at o'clock, standard time, in the noon of said day, to answer under oath such interrogatories as shall be propounded to you touching the goods, chattels, rights, and credits of C.... D...., the above named defendant, in your possession or under your control.

You will make return of this writ on the day of, 19..

WITNESS my hand and the seal of said court this day of, 19..

[SEAL.]

G.... H...., Clerk
District Court, ... County.

**327. Undertaking by garnishee to retain property or money
(Cobbey's Ann. Stats. of Nebr. sec. 1197).**

[*Caption as in Form 6.*]

[*Venue.*]

WHEREAS, upon the examination of E.... F...., the garnishee in the above entitled action, it appeared that the said E.... F.... was at the time of his garnishment possessed of property of the defendant, C.... D...., to-wit [*here describe property*], and was indebted to said C.... D.... in the sum of dollars;

NOW, THEREFORE, we, G.... H.... and J.... K...., residents of County, Nebraska, do hereby undertake and bind ourselves to the plaintiff, A.... B...., as sureties in the sum of dollars, that in case the court shall permit said garnishee to retain the said property and the said amount owing by said garnishee as aforesaid, the said amount shall be paid and the said property shall be forthcoming as the court may direct.

G.... H....

J.... K....

[*Date.*]

The foregoing undertaking, and the sureties thereon, approved this day of, 19..

By the Court:

L.... M...., Judge.

[*Add justification as in Form 289.*]

CHAPTER XII.

REPLEVIN, OR CLAIM AND DELIVERY.

- | | |
|---|---|
| 328. Affidavit in replevin. | plevin where property has been delivered to plaintiff. |
| 329. The same, possession obtained by fraud. | 350. Alternative judgment for plaintiff in replevin. |
| 330. The same, to recover exempt property. | 351. Judgment for plaintiff in replevin for value, property delivered to defendant. |
| 331. Affidavit by one having special property as bailee. | 352. Affidavit in replevin by general owner (Minnesota). |
| 332. Affidavit by pledgee. | 353. Affidavit in replevin by one having special interest only (Minnesota). |
| 333. Affidavit by lessee. | 354. Plaintiff's bond in replevin (Minnesota). |
| 334. Requisition to be endorsed on affidavit. | 355. Exception to sufficiency of sureties (Minnesota). |
| 335. Plaintiff's undertaking in replevin. | 356. Defendant's bond in replevin (Minnesota). |
| 336. Exception by defendant to sufficiency of sureties. | 357. Petition in replevin by unqualified owner (Iowa). |
| 337. Undertaking by defendant in replevin. | 358. The same, to recover property seized on execution (Iowa). |
| 338. Notice of justification of defendant's sureties. | 359. Petition in replevin by qualified owner (Iowa). |
| 339. Justification of sureties before officer, pursuant to notice. | 360. Plaintiff's replevin bond (Iowa). |
| 340. Notice of motion to set aside proceedings for irregularity. | 361. Writ of replevin (Iowa). |
| 341. Affidavit of third person claiming property. | 362. Affidavit of concealment of property (Iowa). |
| 342. Sheriff's demand for indemnity. | 363. Defendant's delivery bond in replevin (Iowa). |
| 343. Undertaking to indemnify sheriff against claim of third person. | 364. Notice to defendant to choose appraiser. |
| 344. Petition for intervention by third person. | 365. Appraisement (Iowa). |
| 345. Order to show cause in intervention proceedings. | 366. Execution in replevin (Iowa). |
| 346. Order allowing intervention and amendment. | 367. Affidavit in replevin (Nebraska). |
| 347. Verdict for plaintiff in replevin. | 368. The same, where exempt property has been seized on execution (Nebraska). |
| 348. Verdict for plaintiff in replevin where his interest is special. | 369. Order of replevin (Nebraska). |
| 349. Verdict for defendant in re- | 370. Bond in replevin. |
| | 371. Oath and appraisal in replevin (Nebraska). |

The common law action of replevin no longer exists under that name in most of the code states; an action to recover the possession of personal property wrongfully detained may, however, be brought in the same manner as any other civil action, and immediate delivery of the property obtained, if plaintiff chooses, by filing a proper affidavit and bond or undertaking. This provisional remedy is generally called "Claim and Delivery." but in Wisconsin it is denominated "Replevin." No writ is issued to the officer, but a simple requisition signed by plaintiff, endorsed upon the affidavit, is sufficient; save that in Nebraska an order of delivery is made by the clerk upon the filing of the affidavit, and in Iowa the action of replevin still exists under that name, and a writ of replevin issues out of court.

328. Affidavit in replevin (Wis. Stats. 1898 sec. 2718; N. Dak. Rev. Codes sec. 5332; S. Dak. Rev. Code C. P. sec. 185).

[*Title of court and of cause.*]

[*Venue.*]

A.... B.... being first duly sworn says that he is the plaintiff [*or the agent or attorney of the plaintiff*] in the above entitled action and makes this affidavit on his own [*or, in said plaintiff's*] behalf.*

That said plaintiff is the owner and lawfully entitled to the immediate possession of that certain personal property, to recover possession of which this action is brought, and which is described as follows, that is to say:.* [describe property].

That the said property is wrongfully detained from said plaintiff by said defendant at, in the county of and state aforesaid; that the alleged cause of such detention, according to the best of deponent's knowledge, information and belief, is that the said C.... D.... claims the right to retain possession thereof as security for the payment of a certain sum of money alleged to have been loaned to one E.... F.... by C.... D...., upon a pledge of said property with said C.... D.... by said E.... F.... [although in fact said E.... F.... was not the owner of said property, and had no right to pledge the same].

That the said property, or any part thereof, has not been taken for a tax, assessment or fine, pursuant to a statute [*in Wisconsin, the statute*] or seized under an execution or attachment against the property of said plaintiff, and that the actual value of said property is dollars.

A.... B....

Subscribed and sworn to before me
this day of, 19..

G.... H...., Notary Public.

329. The same, possession obtained by fraud.

[Proceed as in Form 328, but insert as cause of detention the following]:

That the said defendant claims to have purchased the same from said plaintiff; but said pretended purchase was procured by fraud on the part of said defendant in representing himself to be solvent and worth dollars, when in fact he was insolvent, and wholly unable to pay his debts, and well knew the fact so to be, and made such representations to the said plaintiff with intent to deceive and defraud him; and relying thereon the said plaintiff parted with possession of said goods.

330. The same, to recover exempt property.

[Proceed as in Form 328, but insert in place of the allegation that the property has not been taken for a tax, &c., the following]:

That the said property has not been taken for a tax, assessment, or fine, pursuant to a (the) statute, or seized under an execution or attachment against the property of the plaintiff, except as hereinafter stated.

That the said C.... D.... claims to be sheriff of County, and as such sheriff to have levied upon said property under an execution alleged to have been issued against the plaintiff, which is the alleged cause of the detention of said property, according to the best knowledge, information, and belief of deponent.

That plaintiff is by occupation a carpenter; and that said property above mentioned constituted the working-tools and implements of plaintiff, used and kept for the purpose of carrying on his said business; wherefore said property is exempt by statute from seizure under execution, as deponent is advised by his counsel and verily believes. *[Or state fully other facts showing that the property is exempt under the statute from seizure.]*

331. Affidavit by one having special property as bailee for hire.

*[Proceed as in Form 328, and insert between the * and ** as follows]:*

That the plaintiff is lawfully entitled to the immediate possession of the goods hereinafter described, by virtue of a special property therein arising out of the following facts, to-wit: that said goods were deposited with plaintiff for storage by their general owner, E.... F...., for months, on an agreement by E.... F.... to pay the plaintiff storage therefor, which storage is worth dollars; and they have been taken from

the plaintiff without his consent, and without payment of said storage. And that the plaintiff claims possession, as aforesaid, of the following described property.

332. Affidavit by pledgee.

*[Between the * and the ** in Form 328 insert] :*

That the goods hereinafter mentioned were delivered to the said plaintiff by the said defendant, as a security for the payment of dollars; and that the said defendant, unknown to the said plaintiff, took away said property from the possession of the plaintiff, against his will, and now refuses to return the same, while the said sum of money is still due and unpaid, and the said goods and chattels are his only security therefor; and that said plaintiff is lawfully entitled to immediate possession thereof by virtue of his special property therein, as above set forth, and that said goods and property are described as follows, to-wit:

333. Affidavit by lessee.

*[Between the * and ** in Form 328 insert] :*

That the said plaintiff hired the goods hereinafter mentioned of the said defendant for the term of months, and paid him therefor the sum of dollars; and that said time has not yet expired, and the said defendant unlawfully got possession of said goods, and now wrongfully detains them from the possession of said plaintiff; that plaintiff is lawfully entitled to immediate possession of said goods by virtue of his special property therein as lessee as above set forth, and that said goods are described as follows, to-wit:

334. Requisition to be endorsed on affidavit.

To the Sheriff of the County of, State of

You are hereby required to take the personal property described in the within affidavit from the defendant and deliver the same to the plaintiff in this action.

Dated, 19..

A.... B....
Plaintiff.

335. Plaintiff's undertaking in replevin (Wis. Stats. 1898 sec. 2720; N. Dak. Rev. Codes sec. 5334; S. Dak. Rev. Code C. P. sec. 187).

[Title of court and of cause.]

WHEREAS the plaintiff in the above entitled action, which is brought for the recovery of the possession of certain personal property, claims the immediate delivery of such property, and to that end has made or caused to be made an affidavit therein

as prescribed by statute, and has by endorsement thereon, in writing, required the sheriff of county, in said state, to take the property therein described from said defendant, and deliver the same to the said plaintiff;

NOW, THEREFORE, we, G.... H...., merchant, and J.... K...., farmer, both of in said county, do undertake, promise and agree to and with said defendant in the sum of four hundred dollars that said plaintiff shall prosecute said action with effect and return said property to said defendant if a return is adjudged, and shall pay to him such sum as for any cause may be recovered against said plaintiff in said action.

Dated this day of, 19..

Signed, sealed and delivered
in presence of:

G.... H.... [Seal]
J.... K.... [Seal]

L.... M....
N.... O....

[*Venue.*]

On this day of, 19.., before the undersigned, a notary public in and for said county and state, personally appeared G.... H.... and J.... K...., known to me to be the persons who are described in and who executed the within and foregoing instrument, and acknowledged to me that they executed the same.

P.... Q....
Notary Public.

[*Venue.*]

G.... H.... and J.... K.... being duly sworn, each for himself says that he has signed the within undertaking and that his occupation is therein truly stated; that he is a resident and freeholder within this state, and is worth the sum of two hundred dollars in property within this state, exclusive of his property exempt from execution.

G.... H....
J.... K....

[*Jurat.*]

I approve the within undertaking, and the sureties thereto.

Dated, 19..

R.... S....
Sheriff of County.

336. Exception by defendant to sufficiency of sureties (Wis. Stats. 1898 sec. 2721; N. Dak. Rev. Codes sec. 5335; S. Dak. Rev. Code C. P. sec. 188).

[*Title of court and of cause.*]

To R.... S...., Sheriff of County:

Please take notice that the above named defendant excepts to the sufficiency of the sureties upon the undertaking of the plain-

tiff given in this action to obtain a delivery of the property described in the plaintiff's affidavit herein.

Dated, 19..

C.... D...., Defendant.

By L.... M...., Attorney

[If defendant, except to the sureties they are required to justify in like manner as bail upon arrest. In case of exception to the sureties the defendant cannot give an undertaking to reclaim the property.]

337. Undertaking by defendant in replevin (Wis. Stats. 1898 sec. 2722; N. Dak. Rev. Codes sec. 5336; S. Dak. Rev. Code C. P. sec. 189).

[Title of court and of cause.]

WHEREAS the plaintiff aforesaid has commenced an action in this court to recover the possession of the following described property *[insert description]* and claimed the immediate delivery thereof to him, which property is of the alleged value of dollars; the same having been taken from the possession of the defendant by the sheriff of county, state of, but not yet delivered to the said plaintiff;

And whereas the defendant requires the return of said property;

NOW, THEREFORE, we, the subscribers hereto, G.... H...., merchant, and J.... K...., farmer, both of, in said county, do hereby undertake and become bound to the plaintiff in the sum of four hundred dollars for the delivery of the said property to the plaintiff, if such delivery shall be adjudged, and for the payment to the plaintiff of such sum as may, for any cause, be recovered against the defendant in this action.

Dated this day of, 19..

G.... H....

J.... K....

Signed, sealed and delivered
in presence of:

L.... M....

N.... O....

[Acknowledgment, justification and approval as in Form 335.]

338. Notice of justification of defendant's sureties (Wis. Stats. 1898 sec. 2723; N. Dak. Rev. Codes sec. 5337; S. Dak. Rev. Code C. P. sec. 190).

[Title of court and of cause.]

To the within named A.... B...., Plaintiff.

SIR: You will please take notice that the sureties within named will justify as such before Hon. E.... F...., Circuit

Judge [*or other officer, giving official title*] on the day of, 19.., at o'clock in the noon.

Dated, 19..

L.... M....

Defendant's Attorney.

[*To be served not less than two nor more than six days before justification.*]

339. Justification of sureties before officer, pursuant to notice
(Wis. Stats. 1898 sec. 2723; N. Dak. Rev. Codes sec. 5337; S. Dak. Rev. Code C. P. sec. 190).

[*Title of court and of cause.*]

On this day of, 19.., at pursuant to due notice, personally attended before me, the undersigned, circuit judge of said court [*or insert official title*], G.... H.... and J.... K...., the sureties of C.... D...., the defendant in this action, upon his undertaking to obtain a return of the property, the subject of the action, to justify as such sureties, and the said G.... H.... being first duly sworn for himself says, in answer to interrogatories put to him: [*here state his answers as to his responsibility as surety.*] And the said J.... K.... being first duly sworn, for himself says, on like interrogatories, that: [*here his statement.*]

G.... H....

J.... K....

[*Jurat.*]

[*To be annexed to the undertaking.*]

[*Allowance, to be endorsed on undertaking.*]

[*Venue.*]

This day attended before me the within named G.... H.... and J.... K...., sureties upon the within undertaking, and justified before me; and I find said bail sufficient, and allow the same.

Dated, 19..

E.... F....

[*Official Title.*]

340. Notice of motion to set aside proceedings for irregularity.

[*Title of court and of cause.*]

TAKE NOTICE that on [the annexed affidavit of the defendant, C.... D...., and on the complaint and all the proceedings in this action] the undersigned will move the court, at, on the day of, 19.., at o'clock in the noon, or as soon thereafter as counsel can be heard, that the affidavit made by the plaintiff in this action, and the requisition to

the sheriff of the county of, indorsed thereon, and all proceedings taken by the plaintiff or by the said sheriff, respectively, by virtue thereof, may be set aside as void and irregular for the reason that [*specify irregularity complained of*] and that the property taken by the said sheriff under said affidavit and requisition may be restored by him to the said defendant; and for such other or further relief as may be just [and for the costs of this motion].

Dated, 19..

E.... F....

Attorney for Defendant C.... D....

To L.... M...., Esq.,
Plaintiff's Attorney.

341. Affidavit of third person claiming property (Wis. Stats. 1898 sec. 2727; N. Dak. Rev. Codes sec. 5341; S. Dak. Rev. Code C. P. sec. 194).

[*Title of court and of cause.*]

[*Venue.*]

E.... H.... being duly sworn says that he is the owner of certain personal property, to-wit [*describe property*] and that he is entitled to the immediate possession thereof and hereby claims the same; that said property is now in the possession of R.... S...., sheriff of county, having been lately taken by him upon the requirement of A.... B.... in an action of replevin now pending in said court, at the suit of A.... B.... against C.... D...., defendant; that the grounds of the affiant's title to the said property, and his right thereto, are that he is the sole and absolute owner thereof, and that the same is subject to no liens or special property of any kind therein.

E.... F....,

[*Jurat.*]

[*To be served upon the sheriff.*]

342. Sheriff's demand for indemnity.

[*Title of court and of cause.*]

TAKE NOTICE that E.... F.... claims the property taken by me in this action, and that unless I am indemnified by the plaintiff against such claim I shall not keep the property nor deliver it to the plaintiff.

[*Date.*]

R.... S....

Sheriff County.

To L.... M....,
Plaintiff's Attorney.

343. Undertaking to indemnify sheriff against claim of third person (Wis. Stats. 1898 sec. 2727).

[*Title of court and of cause.*]

WHEREAS, pursuant to the requirement of the plaintiff herein, and upon undertaking duly executed in that behalf, certain personal property claimed by the plaintiff, to-wit [*here describe the property*] and of the value, as he states, of two hundred dollars, was taken by the sheriff of county; and

Whereas one E.... F.... claims the said property and has made and delivered to the sheriff an affidavit of his alleged right thereto and right to possession thereof;

NOW, THEREFORE, in consideration that the said sheriff of county do deliver the said property above described to the said plaintiff, as required by him, we, G.... H...., merchant, and J.... K...., farmer, of, in said county, do hereby undertake, agree and acknowledge ourselves jointly and severally bound unto R.... S...., the said sheriff of county, in the sum of four hundred dollars, to indemnify and save harmless the said sheriff against said claim of E.... F.... and from all costs, damages, expenses or loss by reason of the same, or his action in delivering the said property to the plaintiff.

Dated at, 19..

G.... H....
J.... K....

[*Venue.*]

G.... H.... and J.... K.... being each first duly sworn, each for himself says that he has signed the foregoing undertaking; that his occupation is therein truly stated; that he resides in and is a freeholder [*or, householder*] of said county, and that he is worth the sum of four hundred dollars in property within this state, exclusive of property exempt from execution.

G.... H....
J.... K....

[*Jurat.*]

344. Petition for intervention by third person (Wis. Stats. 1898 sec. 2610).

[*Title of court and of cause.*]

To the Honorable, the Court for County.

THE PETITION of E.... F...., of, in said county, respectfully represents:

That the above entitled action is now pending in this court for the recovery by said plaintiff from the defendant of the follow-

ing described personal property, to-wit [*describe same*], which said action has not yet proceeded to trial or judgment.

That your petitioner is the sole and absolute owner of said property and entitled to immediate possession thereof, and that neither of the parties to this action have any title or interest in said property, or any rightful claim to the possession thereof.

WHEREFORE defendant prays that he be made a party defendant in this action, and that the proper amendment be made for that purpose, and for such further order as may be just.

E.... F....

Petitioner.

[*Jurat.*]

[*To be served on both plaintiff and defendant with following order to show cause.*]

345. Order to show cause in intervention proceedings.

[*Title of court and of cause.*]

On reading and filing the petition of E.... F.... attached hereto, and the papers on file in this action, and on motion of L.... M...., attorney for said petitioner, it is

ORDERED that the plaintiff and defendant in this action show cause before the court at on the day of, 19.., or as soon thereafter as counsel can be heard, why an order should not be made letting the said E.... F...., petitioner, intervene in this action as a claimant for said property described in the complaint herein, and that the proper amendments be made to allow such intervention and setting up of such claim, granting petitioner such other order or relief as may be just;

It is further ordered that a copy of the said petition and this order be served on the plaintiff and defendant herein, on or before the day of, 19.., and that until the hearing of said petition all proceedings herein be stayed.

By the Court:

I.... K...., Circuit Judge.

346. Order allowing intervention and amendment.

[*Title of court and of cause.*]

The petition of E..... F....., coming on to be heard this day of, 19.., upon the order to show cause, the said petition and the pleadings and papers on file in this action, and after hearing L.... M...., Esq., attorney for the petitioner, and N.... O...., Esq., of counsel for the plaintiff [and P.... Q...., Esq., of counsel for the defendant] and the court being advised in the premises; on motion of Y.... Z...., Esq., attorney for the petitioner,

IT IS ORDERED that the said E.... F...., petitioner, be let in as an additional defendant in this action;

That the summons and complaint herein be amended to make him such defendant, with proper allegations for that purpose as the plaintiff may be advised, and that the said intervening defendant have twenty days after service upon him of the amended summons in which to plead thereto as he may be advised.

Dated, 19..

By the Court:

R.... S...., Judge

347. Verdict for plaintiff in replevin (Wis. Stats. 1898 sec. 2859; S. Dak. Rev. Code C. P. sec. 273).

[Title of court and of cause.]

WE, THE JURY in this action, find for the plaintiff that he is the owner of and entitled to the immediate possession of the property described in the complaint, and we assess the value of said property at dollars, and the plaintiff's damages by reason of the detention and withholding of the property at the sum of dollars.

Dated, 19..

J.... K....
Foreman.

[As to forms of verdict in replevin in North Dakota, see N. Dak. Rev. Codes sec. 5447.]

348. Verdict for plaintiff in replevin where his interest is special (Wis. Stats. 1898 sec. 2859; S. Dak. Rev. Code C. P. sec. 273).

[Title of court and of cause.]

WE, THE JURY in this action, find for the plaintiff, that he is the owner of a special interest or property in the property described in the complaint; that the value of said entire property is dollars, and the value of plaintiff's special interest therein is dollars, and that the plaintiff is entitled to immediate possession of said property by virtue of his special interest therein, and that subject to such special interest the defendant is the general owner of said property; and we assess the plaintiff's damages by reason of the taking and withholding of said property at the sum of dollars.

Dated, 19..

J.... K....
Foreman.

349. Verdict for defendant in replevin where property has been delivered to plaintiff (Wis. Stats. 1898 sec. 2859; S. Dak. Rev. Code C. P. sec. 273).

[*Title of court and of cause.*]

WE, THE JURY in this action, find in favor of the defendant, that he is entitled to a return of the property described in the complaint, and assess the value thereof at the sum of dollars, and the defendant's damages by reason of the taking, withholding and detention of the same at the sum of dollars.

Dated, 19..

J.... K....
Foreman.

350. Alternative judgment for plaintiff in replevin (Wis. Stats. 1898 sec. 2885).

[*Title of court and of cause.*]

THIS ACTION HAVING BEEN TRIED before the court and a jury, and the jury having rendered their verdict, wherein they find for the plaintiff that he is the owner of, and entitled to the possession of the property described in the complaint, and assess the value thereof at the sum of dollars, and the plaintiff's damages for the detention thereof by the defendant at the sum of dollars;

And it appearing from the return of the sheriff herein and from the undertaking filed herein on the part of the defendant that the said property was delivered to the defendant, pursuant to the statute, and that G.... H.... and J.... K.... are his sureties, who signed said undertaking in the sum of dollars, pursuant to said statute, to the effect that they were bound, as therein required, for the delivery thereof to the plaintiff, if such delivery be adjudged, and for the payment of such sum to the plaintiff as might for any cause be recovered against the defendant; *

And the plaintiff having in open court elected to take judgment for the recovery of possession of the property described in the complaint, or the value thereof in case a delivery can not be had;

Now, on motion of L.... M...., attorney for the plaintiff,

IT IS ADJUDGED that A.... B...., the plaintiff, do have and recover of C.... D...., defendant, and G.... H.... and J.... K...., his sureties, the possession of the property described in the complaint, as follows [*here describe the property*], together with dollars, his damages assessed as aforesaid, for such detention; and in case a delivery can not be had

of said property, then that said plaintiff do have and recover of said defendant and his said sureties the sum of dollars, the value of said property, in addition to his damages, together with the sum of dollars, the costs of this action as taxed.

Dated and entered this day of, 19..

By the Court:

N.... O...., Clerk.

351. Judgment for plaintiff in replevin for value, property delivered to defendant (Wis. Stats. 1898 sec. 2888).

[*Proceed as in Form 350 to * and then continue*]:

And the plaintiff having in open court elected to take judgment absolutely for the value of said property, and damages for the detention;

Now, on motion of L.... M...., attorney for the plaintiff,

IT IS ADJUDGED that A.... B...., the plaintiff, do have and recover of C.... D...., defendant, and G.... H.... and J.... K...., his said sureties, upon said undertaking, the sum of dollars, the value of said property, the sum of dollars, the plaintiff's damages for the detention thereof, together with the sum of dollars taxed and allowed as costs herein, making in all the sum of dollars.

Dated and entered this day of, 19.

By the Court:

N.... O...., Clerk.

352. Affidavit in replevin by general owner (Minn. Rev. Laws 1905 sec. 4205).

[*Caption as in Form 5.*]

[*Venue.*]

A.... B.... being first duly sworn says that he is the plaintiff [*or, the agent, or, attorney for the plaintiff*] in the above entitled action and makes this affidavit on his own [*or, on said plaintiff's behalf; * that the said plaintiff is the owner and lawfully entitled to the immediate possession of the following described personal property, to-wit [*describe the property*].*

That the same is wrongfully detained from said plaintiff by said defendant; that the same has not been taken for a tax, assessment or fine, pursuant to a statute, or seized under an execution of attachment against the property of said plaintiff, and that the actual value of the aforesaid property is dollars.

A.... B....

[*Jurat.*]

[*Requisition to be endorsed on the foregoing affidavit.*]

To the Sheriff of County, State of Minnesota:

You are hereby required to take the property described in the within affidavit from the defendant in the within entitled cause, and deliver the same to the plaintiff therein, according to law.

Dated, 19..

G.... H....

Plaintiff's Attorney.

353. Affidavit in replevin by one having special interest only (Minn. Rev. Laws 1905 sec. 4205).

[*Proceed as in Form 352 to * and there insert*]: That the said plaintiff is lawfully entitled to the immediate possession of the personal property hereinafter described, by virtue of a special property therein arising out of the following facts, to-wit [*here state facts showing the special property, consult forms given for this purpose in the first part of this chapter for replevin in Wisconsin*]; that said property is described as follows, to-wit [*describe the property, and continue as in Form 352*].

A.... B....

[*Jurat.*]

354. Plaintiff's bond in replevin (Minn. Rev. Laws 1905 sec. 4206).

[*Title of court and of cause.*]

KNOW ALL MEN by these presents that we, A.... B...., as principal, and G.... H.... and J.... K...., as sureties, are held and firmly bound unto C.... D...., the defendant in this action, in the sum of dollars, lawful money of the United States, to be paid unto the said C.... D...., his heirs, executors, administrators or assigns, for which payment well and truly to be made we jointly and severally bind ourselves and each of our heirs, executors and administrators, firmly by these presents.

THE CONDITION of this obligation is such that, whereas an affidavit has been duly made in this action that the said defendant wrongfully detains from said plaintiff certain personal property therein described, of the value of dollars, and said plaintiff claims the immediate delivery of such property to him as authorized by the statute;

Now, therefore, if the said plaintiff shall prosecute said action with effect, and said property shall be returned to said defendant if a return shall be adjudged, and payment shall be made to said defendant of such sum as for any cause may be recovered against the plaintiff then this obligation shall be void; otherwise to remain in full force.

IN TESTIMONY WHEREOF we have hereunto set our hands and seals this day of, 19..

	A.... B....	[Seal]
Signed, sealed and delivered	G.... H....	[Seal]
in presence of:	J.... K....	[Seal]
	L.... M....	
	N.... O....	

[*Venue.*]

On this day of, 19.., before me, a notary public within and for said county, personally appeared A.... B...., G.... H...., and J.... K...., to me known to be the persons described in and who executed the foregoing and within instrument, and acknowledged that they executed the same as their free act and deed.

P.... Q....
Notary Public.

[*Venue.*]

G.... H.... and J.... K...., being duly sworn say, each for himself that he is one of the sureties within named; that he is a resident and freeholder of this state and worth the amount of dollars, specified in the foregoing bond, above his debts and liabilities and exclusive of his property exempt from execution.

G.... H....
J.... K....

[*Jurat.*]

The foregoing bond is hereby approved, this day of, 19..

R.... S....
Sheriff County.

355. Exception to sufficiency of sureties (Minn. Rev. Laws 1905 sec. 4208).

[*Title of court and of cause.*]

To R.... S...., Esq., Sheriff of County:

TAKE NOTICE that the defendant excepts to the sufficiency of the sureties on the bond which the plaintiff herein has given for the purpose of obtaining the immediate delivery of the property which he claims, and that such sureties are required to justify as provided by statute.

Dated, 19..

E.... F....
Attorney for Defendant.

[*To be served on the sheriff within three days after service of the affidavit and bond.*]

356. Defendant's bond in replevin (Minn. Rev. Laws 1905 sec. 4208).

[*Title of court and of cause.*]

KNOW ALL MEN by these presents that we, C.... D...., as principal, and G.... H.... and J... ..K...., as sureties, are held and firmly bound unto A.... B...., the plaintiff in the above entitled action in the sum of dollars lawful money of the United States, to be paid unto the said A.... B...., his heirs, executors, administrators or assigns, for which payment well and truly to be made, we jointly and severally bind ourselves, and each of our heirs, executors and administrators, firmly by these presents.

THE CONDITION of this obligation is such, that, whereas certain personal property has been seized in this action by the sheriff of county under and by virtue of an affidavit and demand of immediate delivery made by the plaintiff herein as provided by statute, and said defendant desires a return of such property to him according to the statute in such case provided;

Now, therefore, if said property shall be delivered to said plaintiff if a delivery is adjudged, and if said plaintiff shall be paid such sum as for any cause may be recovered against the defendant in said action, then this obligation shall be void; otherwise to remain in full force.

IN TESTIMONY WHEREOF we have hereunto set our hands and seals this day of, 19..

	C.... D.... [Seal]
Signed, sealed and delivered	G.... H.... [Seal]
in presence of:	J.... K.... [Seal]
	L.... M....
	N.... O....

[*Acknowledgment and justification and approval as in case of bond by plaintiff.*]

357. Petition in replevin by unqualified owner (Iowa Code sec. 4163).

[*Caption as in Form 6.*]

The plaintiff complains of the defendant and alleges:

I. That he is the full and unqualified owner, and entitled to the present possession of the following described personal property [*particularly describe the property*] and that he acquired his said ownership of said property [*here state how title is acquired, as, by purchase thereof from one E.... F...., or otherwise as the fact may be*].

II. That the said property is of the actual value of dollars and that the defendant C.... D.... wrongfully detains possession thereof from the plaintiff at county, Iowa.

III. That the said property was neither taken on an order or judgment of a court against the plaintiff, nor under an execution or judgment against him or against the property.

IV. That the alleged cause of detention of said property, according to the best belief of the plaintiff is [*here state the alleged ground of detention so far as known to the plaintiff*].

V. That the plaintiff has sustained damages by reason of said wrongful detention in the sum of dollars, no part of which has been paid.

WHEREFORE the plaintiff prays for the issuance of a writ of replevin for said property, and demands judgment for the said property and for the possession thereof or for the value thereof if the same cannot be found, and for his damages and costs.

E.... F....

Plaintiff's Attorney.

[*Verification.*]

358. The same, to recover property seized on execution (Iowa Code sec. 4163).

[*Proceed as in Form 357, but insert in place of allegations III and IV the following*]:

III. That the defendant, C.... D...., is the sheriff of county, Iowa, and that he claims to have levied upon the said property as such sheriff under an execution alleged to have been issued against the plaintiff, which is the alleged cause of the detention of said property by the defendant according to the best belief of the plaintiff.

IV. That the said property is exempt by the statute from seizure under execution, for the reason that [*here state the facts in full constituting the grounds of the exemption from seizure*].

[*Add the following allegation before the prayer for judgment*]:

VI. That on the day of, 19.., the plaintiff caused to be served upon the said defendant a written notice, of which a copy is hereto attached marked Exhibit A, claiming that the property described in the foregoing petition belonged to the defendant, and demanding that said defendant release the said property and turn the same over to the plaintiff, which said defendant has failed and refused to do.

359. Petition in replevin by qualified owner (Iowa Code sec. 4163).

[*Proceed as in Form 357, but insert in place of allegation I the following*]:

I. That the plaintiff is the qualified owner, and entitled to the present possession of that certain personal property described as follows [*here describe the property particularly*], and that the plaintiff's said interest and right arise out of the following facts [*here state the facts showing the plaintiff's qualified ownership, for example*] that said property was deposited with the plaintiff for storage by their general owner, one E.... F...., for months, under an agreement by said E.... F.... to pay to the plaintiff the storage charges therefor, which charges amount at the present time to the sum of dollars, and that the said property has been taken from the plaintiff without his consent and without payment of the said storage charges.

360. Plaintiff's replevin bond (Iowa Code sec. 4166).

[*Title of court and of cause.*]

KNOW ALL MEN by these presents that we, A.... B...., of the county of, state of Iowa, principal, and G.... H.... and J.... K...., of the same county, as sureties, are held and firmly bound unto C.... D.... in the penal sum of dollars, lawful money of the United States, well and truly to be paid to the said C.... D...., his heirs, executors and assigns.

THE CONDITION of this obligation is such that, whereas the said A.... B.... did on the ... day of, 19.., file in the clerk's office of the district court, state of Iowa, for county, his petition claiming of the said C.... D.... the present possession of [*here describe the property*] and praying for the issuance of a writ of replevin therefor.

Now, if the said A.... B.... shall appear at the next term of said court and prosecute his said action to judgment and return the property if such be awarded, and also pay all costs and damages that may be adjudged against him in said action, then this obligation to be void; otherwise to remain in full force and virtue.

Dated, 19..

A.... B....
G.... H....
J.... K....

[*Add justification and approval by clerk or justice.*]

361. Writ of replevin (Iowa Code sec. 4168).

[*Title of court and of cause.*]

THE STATE OF IOWA to the Sheriff of County.

Greeting:

WHEREAS A.... B...., plaintiff, on the day of

....., 19.., filed his duly verified petition in the clerk's office of the district court of the state of Iowa, in and for county, against C.... D...., defendant, claiming of him the following described personal property, to-wit [*here describe property*] which the said plaintiff alleges is wrongfully detained from him by the said defendant, and the plaintiff having executed a bond to the defendant, with sureties approved by me as required by law and filed the same in my office:

YOU ARE, THEREFORE, hereby commanded to take the said property above described and deliver the same without delay to the plaintiff and of this writ make legal service and due return thereof to said court on or before the first day of the next term thereof, to be begun and holden at the court house in, in the county of, Iowa, on the day of, 19..

WITNESS E.... F...., clerk of the district court, with the seal of said court hereunto affixed, this day of, 19..

E.... F....

[SEAL.]

Clerk Court,
..... County, Iowa.

362. Affidavit of concealment of property (Iowa Code sec. 4171).

[*Title of court and of cause.*]

[*Venue.*]

A.... B.... being duly sworn, says that on the day of, 19.., he commenced an action in the district court of county, Iowa, against C.... D.... to recover the possession of the following described personal property, to-wit [*here describe the property*]; that the said C.... D.... has concealed [*or disposed of*] the said property [*or some portion of it, describing same*] so that the writ of replevin can not be executed [*here state the facts of the concealment so far as known*].

He therefore prays that said C.... D.... may be brought before this court [*or judge*] to be dealt with according to law.

A.... B....

[*Jurat.*]

363. Defendant's delivery bond in replevin (Iowa Code sec. 4172).

[*Title of court and of cause.*]

KNOW ALL MEN by these presents that we, C.... D...., principal, and G.... H.... and J.... K...., sureties, are held and firmly bound unto C.... D...., his executors and assigns, in the penal sum of dollars, well and truly to be paid.

THE CONDITION of this obligation is such, that, whereas in an action in the district court of county, Iowa, wherein A.... B.... is plaintiff and C.... D.... is defendant, a writ of replevin has been issued, directing the sheriff of said county to take the personal property therein described and deliver the same to said plaintiff.

Now, if the said C.... D.... shall appear in and defend the said action, and deliver the said property to the plaintiff, if he recover judgment therefor, in as good condition as it was when said action was commenced, and shall also pay all costs and damages that may be adjudged against him, for the taking or detention of said property, then this obligation to be void; otherwise to remain in full force and virtue.

Dated the day of, 19..

C.... D...., Principal.

G.... H.... and J.... K.... Sureties.

[Add justification and approval by clerk or sheriff.]

364. Notice to defendant to choose appraiser.

[Title of court and of cause.]

To C.... D....,

YOU ARE HEREBY NOTIFIED that by virtue of a writ of replevin issued out of the district court of county, Iowa, in an action therein pending, wherein A.... B.... is plaintiff and C.... D.... is defendant, and commanding me to take possession of [*here describe the property*] I have taken possession of said property.

And whereas the said C.... D...., defendant in said action, has given a delivery bond, and said property has been turned over to me and the said plaintiff has requested me to have said property appraised, you the said defendant are therefore required to choose an appraiser on your own behalf to value said property according to law.

Dated, 19..

E.... F....,

Sheriff County, Iowa.

365. Appraisement (Iowa Code sec. 4173).

[Title of court and of cause.]

[Venue.]

We, the undersigned appraisers, selected to examine and appraise the property hereinafter described, which was taken by R.... S...., sheriff of county, Iowa, by virtue of a writ of replevin issued out of the clerk's office of the district court in favor of A.... B...., against C.... D...., defendant in said

action, having been duly sworn, do hereby report that we have valued said property according to its fair value at this time, and that the schedule hereto annexed contains a correct inventory of said property, and that the values therein affixed to each article respectively are the fair values thereof, viz: [*describe each article and give value*].

Signed this day of, 19..

L.... M....
N.... O....

[*Venue.*]

L.... M.... and N.... O...., being each duly sworn, each for himself deposes and says that the foregoing is a just and true appraisalment of the property therein described, to the best of his knowledge and belief.

L.... M....
N.... O....

[*Jurat.*]

366. Execution in replevin (Iowa Code sec. 4177).

[*Title of court and of cause.*]

THE STATE OF IOWA to the sheriff of County.

Greeting:

WHEREAS on the day of, 19.., by the judgment of the district court of county, Iowa, A.... B.... recovered judgment against C.... D.... for the possession of the following described property, to-wit: [*particularly describe property, with value found*] together with dollars, damages and costs, in a certain action then pending in said court, wherein A.... B.... was plaintiff and C.... D.... was defendant, which judgment remains in force and unsatisfied;

You are, therefore, commanded that you cause the said above described property forthwith to be delivered to the said A.... B...., and that you cause to be made of the goods and chattels, lands and tenements of the said C.... D.... subject to execution in your county, the sum of dollars damages and dollars costs of said action, together with all legal costs that may accrue by virtue of this writ, with legal interest, and also in case a delivery of said property, or any part thereof, can not be had, that you further cause to be made of the goods and chattels, lands and tenements of said C.... D.... subject to execution, the sum of the value of said property as above specified with legal interest thereon from the day of, 19.. [*date of the judgment*], and have said money in our said court in seventy days from the date hereof, to render the same

unto the said A.... B.... and have you then and there this writ with your doings thereon.

WITNESS L.... M...., clerk of said court, with the seal thereof hereto affixed this day of, 19..

[SEAL]

L.... M....
Clerk District Court,
..... County.

367. Affidavit in replevin (Cobbey's Ann. Stats. of Nebr. sec. 1153).

[Caption as in Form 6.]

[Venue.]

A.... B.... being first duly sworn, deposes and says: that he is the plaintiff [*or the agent, or attorney of the plaintiff*] in the above entitled action and makes this affidavit on his own [*or said plaintiff's*] behalf; that said plaintiff is the owner of the personal property hereinafter described [*or has a special ownership and interest in the property hereinafter described arising from the following facts, here state facts showing special ownership or interest consulting forms heretofore given for that purpose for replevin in Wisconsin*];

That said property is described as follows: [*here insert description of property*] and that said plaintiff is entitled to the immediate possession of said property;

That the said property is unlawfully and wrongfully detained by C.... D...., the said defendant;

That the said property was not taken in execution on any order or judgment against said plaintiff, or for the payment of any tax, fine or amercement assessed against him, or by virtue of an order of delivery issued under Chapter II of Title VIII of Cobbey's Annotated Statutes of Nebraska, or any other mesne or final process issued against said plaintiff.

A.... B....

Subscribed in my presence, and sworn to before me this day of, 19..

O.... P....
Notary Public.

368. The same, where exempt property has been seized on execution (Cobbey's Ann. Stats. of Nebr. sec. 1153).

[*Proceed as in Form 367, but insert in place of the last paragraph the following*]:

That the said property has not been taken for the payment of any fine, tax or amercement assessed against the plaintiff, or by

virtue of an order of delivery issued under Chapter II of Title VIII of Cobbey's Annotated Statutes of Nebraska, but that the same was taken by the defendant as sheriff of said county of upon an execution issued out of said court and against the property of the plaintiff to enforce a judgment in an action wherein one L M was plaintiff and said A B was defendant; and that the said A B , at the time of the entry of said judgment and the issuance of said execution was a resident of this state and the head of a family, and was a mechanic and builder, and that the property herein described constituted his tools and instruments as such mechanic and builder, used and kept for the purpose of carrying on his said business, and were and are exempt from seizure upon execution [*or otherwise state the facts showing the property to be exempt*].

369. Order of replevin (Cobbey's Ann. Stats. of Nebr. sec. 1154).

[*Title of court and of cause.*]

[*Venue.*]

To the Sheriff of said County.

GREETING: Whereas A B , plaintiff, has commenced an action in the District Court of county against C D , defendant, to recover the following personal property, to-wit: [*here describe property*] now in the possession of C D , defendant, in said county and state, and has filed in my office the necessary affidavit to obtain an order for the immediate delivery of said personal property aforesaid;

You are therefore commanded to seize and take into your custody all the personal property described above, and deliver the same to said A B , the plaintiff in this action; and of this order, and your doings thereon make due return on or before the day of , 19..

GIVEN under my hand and the seal of said court, this day of , 19..

E F

[SEAL]

Clerk of District Court.

370. Bond in replevin (Cobbey's Ann. Stats. of Nebr. sec. 1157).

[*Title of court and of cause.*]

Whereas an order for delivery of the following goods and chattels, to-wit: [*here describe property*] has been issued out of the court of county, Nebraska, in an action now pending in the said court, wherein A B is plaintiff, and C D is defendant, upon an affidavit duly made by the

said A.... B....; and whereas, pursuant to said order R.... S...., sheriff of said county, has taken said goods and chattels and the same have been valued by two responsible persons under oath, at the sum of dollars;

NOW, THEREFORE, we, G.... H.... and J.... K.... do promise and undertake to the said R.... S.... in the sum of dollars, that the said plaintiff shall duly prosecute the action aforesaid, and pay all the costs and damages which may be awarded against him, and shall return the said property to said defendant in case a judgment for the return thereof shall be rendered against the plaintiff herein.

Dated this day of, 19..

Executed in my presence, and the
sureties approved by me, this
day of, 19..

G.... H....
J.... K....

R.... S....
Sheriff.

**371. Oath and appraisal in replevin (Cobbey's Ann. Stats. of
Nebr. sec. 1158).**

[*Title of court and of cause.*]

[*Venue.*]

We, the undersigned, chosen by R.... S...., sheriff of county, Nebraska, to assess the value of the property hereinafter described, which has been taken by said sheriff on an order of delivery in the above entitled action, having been first duly sworn truly to assess the value thereof, do hereby assess the value thereof upon actual view of each article as follows: [*insert description and carry out valuation of each article*] making a total valuation of dollars.

Subscribed in my presence and
sworn to before me this day
of, 19..

L.... M....
N.... O....

R.... S....
Sheriff County.

CHAPTER XIII.

NOTICES AND CLAIMS FOR MECHANICS' LIENS.

- | | |
|--|---|
| <p>372. Claim for mechanic's lien by principal contractor (Wisconsin).</p> <p>373. Claim for mechanic's lien by subcontractor or laborer (Wisconsin).</p> <p>374. Notice of subcontractor's or laborer's lien, to be given owner (Wisconsin).</p> <p>375. Affidavit extending time to commence action (Wisconsin).</p> <p>376. Assignment of claim for lien (Wisconsin).</p> <p>377. Notice of assignment of lien claim (Wisconsin).</p> <p>378. Petition for log lien (Wisconsin).</p> <p>379. Claim for mechanic's lien (Minnesota).</p> | <p>380. Notice of subcontractor's lien (Minnesota).</p> <p>381. Statement of account for mechanic's lien (Iowa).</p> <p>382. Notice of subcontractor's lien (Iowa).</p> <p>383. Bond to discharge subcontractors lien (Iowa).</p> <p>384. Claim for mechanic's lien by principal contractor (North Dakota and South Dakota).</p> <p>385. Notice of lien by subcontractor to owner (North Dakota).</p> <p>386. Statement by subcontractor (South Dakota).</p> <p>387. Notice of thresher's lien (South Dakota).</p> <p>388. Affidavit for mechanic's lien Nebraska).</p> |
|--|---|

372. Claim for mechanic's lien by principal contractor (Wis. Stats. 1898 sec. 3320).

To the Court for County, Wisconsin:

A.... B...., of, in the county of and state of Wisconsin [by G.... H...., his attorney] makes and files this, his claim for a mechanic's lien upon the building hereinafter described, and upon all the interest of C.... D...., of, in the county of, state of Wisconsin, in the land hereinafter described upon which said building is situated, and in that behalf respectfully represents:

That the said A.... B.... is now and was at the several times hereinafter mentioned a carpenter and builder [*or otherwise state petitioner's occupation*] doing business as such in the city of, in the county of and state of Wisconsin; that as such carpenter and builder * on and between the day of, 19.., and the day of, 19.., at the special instance and request of said C.... D...., said A.... B.... performed and caused to be performed work and labor for, and sold and furnished lumber, lath and other building materials [*or otherwise describe the materials according to the fact*]

to the said C.... D.... amounting in the aggregate to the sum of dollars, no part of which sum has been paid except the sum of dollars, a true account of which work, labor and materials so furnished and sold is attached hereto marked Exhibit A.

[*Or, in case the work was done and materials furnished under an entire contract, insert at the **]: on the day of, 19.., entered into a written contract with the said C.... D.... by which said A.... B.... agreed to erect a certain dwelling house for the said C.... D...., and furnish all the materials therefor [*or otherwise state purport of the contract*] in pursuance of which contract, and on and between the day of, 19.., and the ... day of, 19.., the said A... B... performed work and labor, &c. [*proceed as above after the **].

Your petitioner further represents and alleges that said work and labor were done and performed upon, and said lumber and other building materials were sold to be used and were actually used in the erection and construction [*or repair*] of a certain building situated and being upon that certain parcel of land described as follows, to-wit: [*insert accurate description*] of which said real estate the said C.... D.... was at the times herein-after mentioned and still is the owner, as petitioner is informed and believes; that said premises are less than one acre [*or forty acres*] in area, and are [*or are not*] within the limits of an incorporated city; that the last date of the performance of the labor and the furnishing of the materials aforesaid was the day of, 19..; that the property affected by this claim for lien is that hereinbefore described, and that the amount claimed to be due by reason of the premises is dollars, with interest at per cent from, 19..; that six months have not elapsed since the date of the last charge for the performing of such work and the furnishing of such materials.

WHEREFORE your petitioner prays that he may have a lien upon said building erected as aforesaid, and upon all the right, title and interest which said C.... D.... had in and to said premises upon which said building is situated, at the time said work and labor were done and performed and said materials were furnished as aforesaid, to-wit, on the day of, 19.. [*first day of performance*], or that said C.... D.... may have acquired since said time, to the amount of dollars as aforesaid, together with interest as aforesaid, and the costs of this claim and of enforcing the same, in accordance with the statute in such case made and provided.

Dated the day of, 19..

G.... H....

Attorney for Claimant.

373. Claim for mechanic's lien by subcontractor or laborer
(Wis. Stats. 1898 secs. 3315-3320).

To the Court for County, Wisconsin.

A.... B...., of, in the county of, state of Wisconsin, by G.... H...., his attorney, makes and files this, his claim for a lien upon the building hereinafter described, and the interest of C.... D...., of, county of, Wisconsin, in the land upon which the said building is situated, as hereinafter described.

The said claim is founded upon a demand by the said claimant against L.... M...., of, in the county of, in said state, who was employed by said C.... D.... to perform work and labor and to furnish materials in or about the erection and construction [*or repair*] of a certain dwelling house owned by said C.... D.... upon the premises hereinafter described [*if the employment was by written contract allege the fact*].

The claimant alleges that he was employed as a carpenter [*or mason*] by the said L.... M.... and as such carpenter [*or mason*] the claimant performed work and labor for and furnished material to said L.... M.... in the construction of said building, as follows: that the claimant did days work upon said building for which work the said L.... M.... agreed to pay the sum of two dollars per day; that said work and labor was actually begun on the day of, 19.., and was concluded on the day of, 19..; that said work and labor were done and performed upon, and said materials were sold and furnished to be used and were actually used in the erection and construction [*or repair*] of said dwelling house, situated and being upon the following described land, to-wit: [*describe premises accurately*] that said C.... D.... is the owner of said land, and of said dwelling house situated and being thereon, as the claimant is informed and believes; that the above described land does not exceed one acre [*or forty acres*] in area and is [*or is not*] within the limits of an incorporated city or village; that the last date of the performance of labor and of furnishing materials as aforesaid by the claimant was the day of, 19..; that the property affected by this claim for lien is that hereinbefore described; that the amount claimed to be due to the claimant by reason of the premises is dollars, together with interest from, 19..; that six months have not elapsed since the work and labor were performed and the materials furnished by the claimant as herein above set forth, and that within sixty days from the date of the last charge for performing such work and labor and furnishing such materials, to-wit, on the day of

....., 19.., the claimant did give notice in writing to C.... D...., the owner of the property above described to be affected by the lien herein claimed setting forth that the claimant had been employed by said L.... M.... as carpenter [*or mason, or otherwise according to the fact*] to perform and furnish, and that the claimant had so performed and furnished such work, labor and materials, together with a statement of the labor performed and materials furnished and the amount due therefor from said L.... M.... as herein above set forth, and that the claimant claims the lien given by chapter 143 of the Revised Statutes.

WHEREFORE the claimant prays that he may have a lien upon said dwelling house, and upon all the right, title and interest which said C.... D.... had in and to said land upon which said dwelling house is situated, at the time said work and labor were done and performed and said materials were furnished as aforesaid, to-wit, on the day of, 19.., or that said C.... D.... may have acquired since said time to the amount of dollars as aforesaid, together with interest as aforesaid, and the costs of this claim, and of enforcing the same in accordance with the statute in such case made and provided.

Dated the day of, 19.. G.... H....

Attorney for Claimant.

374. Notice of subcontractor's or laborer's lien, to be given owner (Wis. Stats. 1898 sec. 3315).

To L.... M....:

You are hereby notified that the undersigned, on and between the day of, 19.., and the day of, 19.., performed work and labor [and furnished lumber and other building materials] in and upon the erection and construction of that certain dwelling house owned by you and situated upon [*describe real estate*] and that the undersigned was employed by C.... D...., the principal contractor [*or a subcontractor*] with you in the erection of said building, to perform such work and labor and furnish such materials; that the statement attached hereto and marked Exhibit A is a true statement of the said labor performed and materials furnished, and that there is now due the undersigned from said C.... D.... thereon the sum of dollars, with interest from, 19.., for which the undersigned claims a lien upon said dwelling house and real estate pursuant to the provisions of chapter 143 of the Statutes of 1898.

A.... B....

[*Date.*]¹

[*Attach itemized statement of account.*]

375. Affidavit extending time to commence action (Wis. Stats. 1898 sec. 3318).[*Venue.*]

A.... B.... being duly sworn says that on the day of, 19.., he filed in the office of the clerk of the court for county, Wisconsin, his written claim for a mechanic's lien upon that certain dwelling house in the of, in said state, owned by L.... M...., and upon all the interest of the said L.... M.... in the real estate on which said dwelling house is situated, described as follows [*insert description*]; deponent further says that no part of said claim has been paid, and that there is now due and owing to him upon said claim the sum of dollars, with interest from, 19.., which sum is the full amount of the interest which this deponent still has by virtue of such lien in the property herein described.

A.... B....

[*Jurat.*]**376. Assignment of claim for lien (Wis. Stats. 1898 sec. 3316).**

WHEREAS A.... B...., of, county of, Wisconsin, on and between the day of, 19.., and the day of, 19.., performed work and labor as carpenter [*or otherwise according to the fact*] and furnished lumber and other building materials in the erection and construction of a certain dwelling house situated upon [*describe premises*], which labor and materials were performed and furnished at the special instance and request of L.... M...., the owner of said dwelling house and premises, and were reasonably worth the sum of dollars, no part of which sum has been paid [*except, &c.*], and the sum of dollars is now due thereon;

NOW, THEREFORE, in consideration of the sum of dollars to me paid by C.... D...., of, county of, Wisconsin, I, the said A.... B...., hereby sell, assign and transfer to said C.... D.... the said account and demand, with all sums due and to grow due thereon with interest, together with the claim for a mechanic's lien upon said dwelling house and real estate founded upon said account or demand, and all rights of action to recover therefor under chapter 143 of the Statutes of 1898.

WITNESS my hand and seal this day of, 19..

A.... B.... [Seal]

In presence of:

G.... H....

J.... K....

377. Notice of assignment of lien claim (Wis. Stats. 1898 sec. 3316).

To L.... M.... [Owner]:

Take notice that A.... B...., of, county of, 19.., has duly assigned to the undersigned his claim for lien upon that certain dwelling house owned by you and situated upon [*describe premises*] and all rights of action therefor. Take notice also that attached hereto, marked Exhibit A, is a true copy of the assignment of said claim, and that the amount now due the undersigned upon said claim is the sum of dollars, with interest from, 19..

C.... D....

[*Date.*]

[*Attach copy of assignment and serve on owner.*]

378. Petition for log lien. (Wis. Stats. 1898 sec. 3330).

To the Court, for County, Wisconsin.

THE PETITION of A.... B...., of, county or, state of Wisconsin, respectfully shows that between the day of, 19.., and the day of, 19.., the petitioner performed work, labor and services for and at the request of C.... D...., of, county of, state of Wisconsin, in and about the cutting, falling, skidding, hauling, scaling, driving, running, rafting, booming, cribbing and towing about thousand pine saw logs [*or other timber*] marked as follows [*give marks*];

That such work, labor and services were done and performed on section No., township No.... of range in the county of and state of Wisconsin, between the day of, 19.., and the day of, 19.., and the same were completed on the day of, 19..;

That the sum of dollars became due and payable to this petitioner from the said C.... D.... on account of the said labor on the day of, 19.., but that no part thereof has been paid; and the petitioner therefore claims a lien upon the aforesaid pine logs [*or other timber*] for the aforesaid sum so due and unpaid to him, with interest thereon from the day of, 19.., and costs.

A.... B....

[*Venue.*]

A.... B.... being duly sworn says that he has read the above and foregoing petition by him signed, and knows the contents thereof, and that the same is true of his own knowledge except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

A.... B....

[*Jurat.*]

379. Claim for mechanic's lien (Minn. Rev. Laws 1905 sec. 3511).

[Venue.]

In the matter of the claim of A.... B.... for a mechanic's lien.	}
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Notice is hereby given that A.... B...., of, county of, state of Minnesota, hereby claims a mechanic's lien upon the building and premises hereinafter described, in pursuance of the statutes of the state of Minnesota, and for the purpose of availing himself of the benefit of such lien and continuing the same, makes the following statement in writing, and alleges:

1. That the amount actually due and owing him, after allowing all just credits and offsets, is the sum of dollars.

2. That such amount is due and owing for labor performed [and for skill, material and machinery furnished] by claimant in the erection, construction and repair of a certain dwelling house situated on the premises hereinafter described, which labor was performed at the special instance and request of C.... D...., the owner of said dwelling house and premises [*or by virtue of a written contract with C.... D...., owner, &c., by the terms of which contract the claimant agreed to construct said building for the sum of dollars*] [*or otherwise describe the contract of employment according to the fact*].

3. The time when the first item of such labor [*or skill, &c.*] was furnished is, 19.. The time when the last item of such labor [*or skill, &c.*] was furnished, is, 19..

4. The following is a description of the property to be charged with the lien: that certain dwelling house [*or other building, describing it*] situated upon [*describe premises*].

5. The name of the owner or reputed owner of the property charged with the lien at the time of making this statement, is C.... D...., according to the best information then had.

6. Notice is hereby given of the intention of said A.... B.... to claim and hold such lien.

Dated, 19..

A.... B....

[Venue.]

A.... B...., of said county, being duly sworn, says he is the claimant named in the foregoing claim of lien; that he has knowledge of the facts therein stated, and that the same are true.

A.... B....

[Jurat.]

380. Notice of subcontractor's lien (Minn. Rev. Laws 1905 sec. 3510).

To L.... M.... [Owner].

You are hereby notified that I have been employed by [or, have contracted with] C.... D.... [*principal contractor*] to [*here state whether to perform labor or furnish skill, material, or machinery, or both, and substantially the nature of the undertaking or demand*] upon your [*here state the building or other structure or improvement, and where situate, in general terms*], and that I shall hold the building [*or other structure, describing it as the case may be*] and your interest in the land liable for the amount that is [*or may become*] due me on account thereof. That said amount is [*or will be*] dollars [*state the amount as nearly as may be*].

A.... B....

[Date.]

381. Statement of account for mechanic's lien (Iowa Code sec. 3092).

[*Draw itemized statement of the account in form of debits and credits, with dates and description of labor or materials furnished and balance due, and attach the following affidavit*]:

[*Venue.*]

A.... B.... being duly sworn says that the above and foregoing account is a just and true account of the labor performed and materials furnished by him in the erection, construction and repair of that certain dwelling house in the city of, state of Iowa, situated upon the premises hereinafter described, as well as of all payments made upon said account, and that the balance justly due and owing him thereon, after allowing all credits, is the sum of dollars, with interest from, 19..; deponent further says that said labor was performed and said materials furnished pursuant to and by virtue of the terms of a certain contract [*in writing*] which this deponent entered into on the day of, 19.., with one L.... M...., by the terms of which deponent agreed to perform all the labor and furnish all the materials [*or otherwise, as contract was*] in and about the erection and construction of a certain dwelling [*or other building, describing it*] situated upon [*describing premises*] of which said premises the said L.... M.... was then and is now the owner in fee [*or other interest*]; that said labor was performed and said materials furnished at the times stated in said account, and between and including the day of, 19.. [*first date*], and the day of, 19.. [*last date*], at which time the said contract was fully completed and that the

various amounts charged in said account for said labor and materials are the true and correct amounts justly due and owing therefor pursuant to the terms of said contract, and that no payments have been made upon said account or contract other than those credited in said account. Deponent further says that for the balance due upon said account, to-wit, the sum of dollars, with interest, as aforesaid, he claims a mechanic's lien upon said building [*or other improvement, describing it*] and upon the land above described whereon the same is situated.

A.... B....

[*Jurat.*]

382. Notice of subcontractor's lien (Iowa Code sec. 3093).

To L.... M.... [Owner].

Take notice that on the day of, 19.., the undersigned filed with the clerk of the district court for the county of, Iowa, a verified and correct statement or account of the demand due me, after allowing all credits, for materials furnished and labor performed by me in and about the erection and construction [*or repair*] of that certain dwelling house [*or other building, describing it*] situated on the following described real estate [*describing it*] which statement contained a correct description of the property sought to be charged with a mechanic's lien as above described, and the time when said materials were furnished and said labor was performed, and claimed a mechanic's lien upon said building and lands for dollars, and interest from, 19...., being the balance justly due me thereon.

A.... B....

[*Date.*]

383. Bond to discharge subcontractor's lien (Iowa Code sec. 3093).

KNOW ALL MEN by these presense that we, L.... M...., principal, and G.... H.... and J.... K...., sureties, all of county, Iowa, parties of the first part, are held and firmly bound to A.... B...., of county, Iowa, party of the second part, in the penal sum of dollars, lawful money of the United States, well and truly to be paid.

THE CONDITION of this obligation is such that, whereas the said A..... B..... on the day of, 19.., filed in the office of the clerk of the district court of county, Iowa, a written verified statement or account of the demand due and owing him from C.... D.... [*principal con-*

tractor], and claiming a mechanic's lien therefor on the following real estate [*describe the building and land as in the claim*];

NOW, if the said party of the first part shall and will pay to said second party, his heirs, assigns, or administrators, any sum of money for which said second party may obtain judgment upon the demand for which said statement or account has been filed, then this obligation to be void; otherwise it is to be and remain in full force and virtue.

WITNESS our hands this day of, 19..

L.... M....

G.... H....

J.... K....

[*Add justification and approval by clerk.*]

384. Claim for mechanic's lien by principal contractor (N. Dak. Rev. Codes sec. 4791; S. Dak. Rev. Code C. P. sec. 703).

[*Venue.*]

A.... B.... being duly sworn says that he is a carpenter [*or, stone mason, or otherwise according to the fact*] and that between and including the day of, 19.., and the day of, 19.., at the special instance and request of one C.... D...., of, county of, state of [*or pursuant to the terms of a written contract theretofore made by deponent with one C.... D...., of, etc.*], the said A.... B.... performed labor upon and furnished materials for the erection and construction of a certain dwelling house for the said C.... D.... situated upon the following described land [*describe premises*] as particularly set forth in the annexed account, marked Exhibit A, at the respective dates, and at and for the respective prices specified in said account; that said account is a just, true and full statement of the labor performed and the materials so furnished to said C.... D.... in and about the erection of said dwelling house [*under said contract*], and that the prices so charged in said account are the reasonable value of said labor actually performed and said materials actually used in the erection of the building aforesaid, and that there is due and owing thereon to deponent, after allowing all credits, the sum of dollars, for which a mechanic's lien is hereby claimed in favor of the said A.... B.... upon the said dwelling house and upon the said land upon which the same is situated, which land was then and is now owned by the said C.... D....

A.... B....

[*Jurat.*]

[*Attach itemized account.*]

385. Notice of lien by subcontractor to owner (N. Dak. Rev. Codes sec. 4788).

To C.... D.... [Owner].

Dear Sir:

You are hereby notified that the undersigned, of, county of, state of North Dakota, on and between the day of, 19.., pursuant to contract with [*or at the special request of*] one L.... M.... [*principal contractor*], performed labor as subcontractor, and furnished material for the erection of that certain dwelling house owned by you and situated upon [*describe premises*] which labor and materials amounted to and were of the reasonable value of dollars, as fully set forth in the account attached hereto and marked Exhibit A, no part of which sum has been paid [*except, etc.*]. And you are further notified that the undersigned will claim a mechanic's lien upon said dwelling house and land for the said sum.

Yours, etc.,
A.... B....[*This notice is to be given by registered mail.*]**386. Statement by subcontractor (S. Dak. Rev. Code C. P. sec. 699).**

SUBCONTRACTOR'S STATEMENT.

A.... B...., of, county of, state of South Dakota, hereby states and alleges that as subcontractor of one C.... D.... [*principal contractor*], on and between [*give dates*] he performed labor and furnished materials for the erection of that certain dwelling house situated upon [*describe land*], a true account of which labor and materials so furnished, with dates of furnishing and the reasonable value thereof is as follows:

[*Insert itemized account*].

The said A.... B.... further states that no part of said account has been paid, and that said dwelling house and land is owned by L.... M...., of, county of, state of South Dakota.

A.... B....

[*Venue.*]

A.... B.... being duly sworn says that he has read the foregoing statement and knows the contents thereof, and that the same is just and true.

A.... B....

[*Jurat.*]

387. Notice of thresher's lien (S. Dak. Rev. Code C. P. sec. 739).

[Venue.]

A.... B.... being duly sworn, says that at the times hereinafter stated he owned and operated a threshing machine in the state of South Dakota [*or* was a member of the firm of A.... B.... and Company, composed of deponent and E.... F...., which firm at the time hereinafter stated owned and operated, &c., *as above*]; that between the day of, 19.., and the day of, 19.., the said A.... B.... [*or* the said firm] threshed for one C.... D.... a quantity of grain, which said grain was grown upon the following described premises [*describe farm*], county of, South Dakota; that the following is a true account of the kind of grain, and the number of bushels so threshed for the said C.... D...., and the price agreed upon for such threshing as aforesaid:

.... bushels of wheat at the agreed price of c.	
per bushel	\$
.... bushels of oats at the agreed price of c.	
per bushel	

Total\$

That there is due and owing to said A.... B.... [*or*, to said firm] from the said C.... D.... for threshing the grain and seed, as per above account, the sum of dollars, for which amount said A.... B.... [*or* said firm] claims a lien on said grain so threshed as aforesaid, pursuant to law.

A.... B....

[Jurat.]

388. Affidavit for mechanic's lien (Cobbey's Ann. Stats. of Nebr. secs. 7101, 7102).

[Venue.]

A.... B.... being first duly sworn, says: That the account hereto annexed marked Exhibit A is a full, true and correct itemized account of the labor performed and materials furnished by him to and for one C.... D.... [*insert name of owner or the principal contractor, if petitioner was a subcontractor*], in said county, and that the prices thereof set forth in said account are just and reasonable, and in accordance with the contract hereinafter mentioned, and that there remains due and unpaid thereon the sum of dollars, over and above all credits.

That said labor was performed and said materials were furnished under and by virtue of a written contract between the said A.... B.... and the said C.... D.... [*name of owner or prin-*

cipal contractor], a copy of which contract is hereto annexed, marked Exhibit B [*a copy must be attached if the contract was written*].

That said labor was performed and said materials were furnished for the purpose of erecting a certain dwelling house [*or otherwise describe improvement*] standing on the land hereinafter described [*insert if the claimant is a subcontractor*] and that the said C.... D.... was the principal contractor for the erection of said building with one L.... M...., who was and is the owner thereof.

That the said L.... M.... was, at the time said contract was entered into and said labor was performed and said materials were furnished, the owner of said land upon which said building is situated, which land is described as follows [*insert description*].

That the first item of said labor was performed and materials were furnished on the day of, 19.., and the last on the day of, 19..

And deponent further says that he, the said A.... B...., is the legal owner of the above mentioned account, and that he claims a lien on the premises for the full amount thereof to-wit, the sum of dollars, with interest thereon at the rate of per cent. per annum from the day of, 19..

A.... B....

[*Jurat.*]

CHAPTER XIV.

TEMPORARY INJUNCTIONS.

- 389. Supporting affidavit on motion for injunction (Wisconsin, North Dakota and South Dakota).
- 390. The same, another form.
- 391. Affidavit on which to move for injunction pending the litigation, to prevent the doing of some act tending to render the judgment ineffectual (Wisconsin, North Dakota and South Dakota).
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- 405. Against removing fixtures.
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- 407. The same; continuance of slaughter-house.
- 408. Against noisy bells.
- 409. Against obstructing lights.
- 410. Against undermining plaintiff's land.
- 411. Against stopping a way.
- 412. Against erection, and to compel removal of buildings.
- 413. Against authorizing the laying of a railroad in a city street.
- 414. Against laying a railroad in a city street.
- 415. Against violation of covenant to build.
- 416. Against contractor interfering with work after forfeiting his contract.
- 417. Against underletting.
- 418. Against carrying on business forbidden by lease.
- 419. Against transferring negotiable paper.
- 420. Against transfer of stock.
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- 422. Against publishing a book.

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| 423. Against publishing private letter.
424. Against resuming practice, after having sold business.
425. Against disclosure of secrets by clerk.
426. Against use of a secret in trade, by one who acquired it in violation of contract.
427. Against infringement of trade-mark.
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430. Against entering confession of judgment.
431. In partnership cause.
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441. Bond for injunction (Minnesota).
442. Writ of temporary injunction (Minnesota).
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444. Order allowing injunction, to be endorsed on the petition (Iowa).
445. Bond on injunction (Iowa).
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447. Order granting injunction, to be endorsed upon petition (Nebraska).
448. Order of injunction (Nebraska).
449. Affidavit for modification or vacation of temporary injunction.
450. Notice of motion to vacate or to modify injunction.
451. Order vacating or modifying injunction.
452. Notice of motion for reference to ascertain damages.
453. Order of reference.
454. Notice of motion to confirm report of referee.
455. Order confirming referee's report. |
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The provisional remedy by means of which the *status quo* is preserved during the pendency of an action is called a temporary injunction, and forms the subject of the forms given in this chapter. In Wisconsin, North Dakota, South Dakota, and Nebraska, the remedy is not obtained by writ but, in the three states first named, by order of the court or judge, and in Nebraska by order issued by the clerk on the allowance of the court or judge. In Minnesota and Iowa the remedy is obtained by formal writ on the allowance of the court or judge.

The differences in procedure, however, do not affect the substantial character of the remedy. In general terms it may be said that it is granted when it satisfactorily appears by positive verified allegations in the pleadings, or affidavits, or both, that some act is about to be committed which will tend to defeat or render ineffectual the final judgment, if one be rendered.

389. Supporting affidavit on motion for injunction (Wis. Stats. 1898 sec. 2773 et seq.; N. Dak. Rev. Codes sec. 5343 et seq.; S. Dak. Rev. Code C. P. sec. 196).

[*Title of court and of cause.*]

[*Venue.*]

E.... F.... being duly sworn, says that he has read the complaint in this action and is familiar with all the material matters stated therein, and has actual knowledge thereof; and that from such knowledge he knows that the matters of fact therein stated are true [*here add statement as to means of knowledge, &c., e. g. thus*]: that deponent, until a few days last past, was in the employ of said defendant as bookkeeper and had free access to the books of said copartnership and of said defendant, and had and has personal knowledge of the financial and other business matters of the said concern, and of said defendant.

E.... F....

[*Jurat.*]

390. The same, another form (Wisconsin, North Dakota, and South Dakota).

[*Title of court and of cause.*]

[*Venue.*]

E.... F.... being duly sworn, says that he has [heard read] read the complaint in this action, and that he is the agent of the plaintiff in charge of the plaintiff's business in this state [*or otherwise state affiant's relation to the parties*].

That he, affiant, knows of his own knowledge that [*here state the facts within affiant's knowledge which he is able to swear to showing that an injunctive order is proper or necessary*].

E.... F....

[*Jurat.*]

391. Affidavit on which to move for injunction pending the litigation, to prevent the doing of some act tending to render the judgment ineffectual (Wisconsin, North Dakota, and South Dakota).

[*Title of court and of cause.*]

[*Venue.*]

A.... B.... being first duly sworn, says that he is the plaintiff in the above entitled action; that the same was commenced by the service of summons on the defendant on the day of, 19.., and that said defendant threatens and is about to remove and dispose of his property with intent to defraud his creditors, and particularly this plaintiff [*or state particularly*

the threatened act which it is desired to be enjoined and which tends to render a judgment ineffectual].

That affiant's knowledge of the said defendant's purpose is as follows [*state the facts showing defendant's purpose*].

That said acts and doings are in violation of this affiant's rights, and tend to render the judgment which he seeks herein ineffectual.

A.... B....

[*Jurat.*]

392. Notice of motion for injunctional order (Wisconsin, North Dakota, and South Dakota).

[*Title of court and of cause.*]

PLEASE TAKE NOTICE that on the verified complaint in this action [and upon the affidavit of A.... B...., both of which are attached hereto and served upon you] the undersigned will move the court at a term to be held at on the day of, 19.., at o'clock in the noon, or as soon thereafter as counsel can be heard [*or will move before I...K...., at his office in the city of on the day of, 19.., at o'clock in the noon*] for an injunctional order restraining the defendant, his agents and servants, from [*here state concisely the act to be enjoined*]; and for such other or further order as may be just.

Dated, 19..

L.... M....

Attorney for Plaintiff.

To C.... D...., Esq.,
Defendant.

393. Order to show cause why injunctional order should not, be granted with temporary restraining order (Wisconsin, North Dakota, and South Dakota).

[*Title of court and of cause.*]

Upon reading and filing the verified complaint in this action, and the affidavits of the plaintiff and of E.... F...., and on motion of L.... M...., attorney for the plaintiff,

IT IS ORDERED that the defendant show cause before me at my chambers [*or office*] in the of, in said county, on the day of, 19.., at ten o'clock A. M. of said day, why a temporary injunction should not be granted restraining said defendant from [*here specify particularly the act to be enjoined*].

It is further ordered that until the hearing of said motion and order therein, the defendant do absolutely desist and refrain from [*specify the act enjoined*].

And let a copy of this order be served on said defendant at least forty-eight hours before the time fixed for hearing the motion as aforesaid.

Dated at , in said county, this day of , 19..
R. . . . S. . . . , Judge.

394. Undertaking on injunction (Wisconsin, North Dakota, and South Dakota).

[*Title of court and of cause.*]

WHEREAS A. . . . B. . . . , the plaintiff herein, has applied [or is about to apply] for an injunction commanding the defendant herein to absolutely refrain from [*here specify the act to be enjoined*].

NOW, THEREFORE, we, A. . . . B. . . . , plaintiff, as principal, and E. . . . F. . . . , merchant, and G. . . . H. . . . , farmer, both of county, aforesaid, as sureties, do hereby undertake, pursuant to the statute, that the plaintiff will pay to the defendant C. . . . D. . . . such damages, not exceeding dollars, as he may sustain by reason of the injunction, if the court shall finally decide that the plaintiff was not entitled thereto.

Dated at , ... , 19..

A. . . . B. . . .

E. . . . F. . . .

G. . . . H. . . .

[*Justification by sureties, and acknowledgment if required by statute or rule of court.*]

I hereby endorse the within undertaking as to form and sufficiency of sureties.

N. . . . O. . . . , Judge.

395. Injunctive order granted on motion (Wisconsin, North Dakota, and South Dakota).

[*Caption, title of court and cause.*]

On reading and filing the verified complaint of the plaintiff herein; and the affidavits of the plaintiff and E. , from which it appears that necessity exists therefor;

And the plaintiff having given an undertaking as required by law, in the sum of dollars, which has been duly approved;

And on motion of L. . . . M. . . . , attorney for the plaintiff;

IT IS ORDERED that C. . . . D. . . . , defendant herein, his attorneys, agents and servants, do absolutely desist and refrain from [*here specify act enjoined*] until the further order of the court.

Dated at , this day of 19..

N. . . . O. . . . , Judge.

396. The same, when granted on order to show cause (Wisconsin, North Dakota, and South Dakota).

[*Title of court and of cause.*]

The motion for a temporary injunction herein, coming on to be heard upon the order to show cause herein, at the time and place specified therein;

On reading the affidavits of the plaintiff and E.... F...., and the verified complaint of the plaintiff in support of the motion and the affidavits of the defendant and G.... H.... in opposition thereto, and after hearing L.... M...., Esq., attorney for the plaintiff, for, and N.... O...., Esq., attorney for defendant, in opposition to the motion, the plaintiff having given an undertaking in the sum of dollars, as required by law, which has been duly approved;

IT IS ORDERED that C.... D...., defendant herein, his attorneys, agents and servants do absolutely desist and refrain from [*here specify what*] until the further order of this court.

Dated at this day of, 19..

R.... S...., Judge.

397. Proof of service of injunction by affidavit (Wisconsin, North Dakota, and South Dakota).

[*Title of court and of cause.*]

[*Venue.*]

W.... X.... being first duly sworn, says that he is the [clerk in the office of] attorney for the plaintiff in the above entitled action, and that on the day of, 19.., at the hour of o'clock in the noon, at in said county, he served the injunctive order [of which a copy is] hereto annexed on the the defendant C.... D.... by exhibiting the original order to said defendant, and the signature of Hon. R.... S.... thereon, and by delivering to and leaving with said defendant a true copy of said order, and the following papers, to-wit [*here specify others papers, if they are served with order*], and that he, the affiant, knew the person so served to be the defendant in this action, on whom said injunction was to be served.

W.... X....

[*Jurat.*]

398-439. Various statements of acts enjoined, to be inserted or adapted for use in the foregoing forms.

398. Against waste or alienation: From pulling down or otherwise injuring the buildings standing on the premises hereinafter described, or any part thereof, or from committing any

waste, spoil, or destruction upon the said premises, and from executing and procuring to be executed any conveyance of the said premises, to any person or persons other than to the plaintiff, or as he shall direct.

The said premises are known as, and are bounded and described as follows [*description*].

399. Against waste by ploughing or by cutting timber: From ploughing up any of the fields forming part of the premises [*designating them*], from cutting down, felling, barking, or otherwise wasting or impairing any timber trees, or underwood standing and growing on [*designating the premises*], and from committing any further or other waste or spoil in or upon the said land and premises.

400. Against waste in respect of house or ornamental trees: From committing waste, spoil, or destruction in the mansion or other houses upon [*designate the premises*] and from cutting down any timber or other trees growing upon the said estates, which are planted or growing there for the protection of the said mansion and other houses belonging to the said estates or for the ornament of the said house, or which grow in lines, walks, vistas, or otherwise for the ornament of the said houses, or of the gardens, parks, or pleasure-grounds thereunto belonging; and also to restrain him, his servants, workmen, and agents, from cutting down any timber or other trees, except at seasonable times, and in husbandlike manner; and likewise from cutting saplings and young trees not fit to be cut, as and for the purposes of timber.

401. Against working a mine: From working the veins or seams of coal, iron, stone, and other minerals lying in, upon, or under the [*designate lands*] and from digging, getting and carrying away or selling or disposing of the coal, culm, and iron, stone, and other minerals produced therefrom.

402. Against tenant of a mine: From carrying the brick-clay, or bricks or tiles made thereof, off the land [*designating it*]; from working away sufficient barriers in the seam in the parts adjoining; from making a communication into adjoining collieries, and from draining any other mines, or permitting the same to be drained, by means of the demised colliery; and from permitting the communication complained of to continue open, and from permitting any water to flow through the same into the demised colliery; and from raising, by means of the shafts on the demised premises, any coal of any other proprietor; and from carrying the same over the demised premises.

403. Against taking possession of lands without payment: From entering upon any part of the lands hereinafter described, until the said defendants shall have paid the plaintiff dollars; and that if the said defendants shall not pay the said sum of dollars, being the residue of the purchase-money of said lands, by the said day of, then, and in such case, the said defendants are hereby restrained from in any wise proceeding with the works of their railroad in, upon or over any part of the said lands.

The said premises are known as and bounded and described as follows [*description*].

404. Against taking rents and profits: From collecting, receiving, or intermeddling with the rents and profits of the premises known as at and described as follows [*description*].

405. Against removing fixtures: From removing or causing to be removed from the premises hereinafter described any bricks, timber, building materials, copper pans, or fixtures. Said premises are known as at and described as follows [*description*].

406. Against nuisance; burning brick: From burning or manufacturing, or causing to be burnt or manufactured, bricks on a piece of land or premises in the defendant's possession [*describe the premises by name or abutments, or otherwise. If by abutments, the description may be thus: abutting on the east, south, and west on the lands and premises of the plaintiff*], situate in the town of, in the county of, and whereon is erected a brick-kiln, so as to occasion damage or annoyance to the plaintiff as owner, or to his tenants respectively as occupiers of a dwelling-house of the plaintiff [*describe plaintiff's premises*] situate in aforesaid.

407. The same; continuance of slaughter-house: From occupying a building erected by the defendant Y.... Z.... on the [north] side of street, between and avenues in the of, county of and state of, as a slaughter-house, and from slaughtering any animals in such building, and from permitting the building to be used as a slaughter-house.

408. Against noisy bells: From tolling or ringing the chapel bell and the church-bells in the church at, or any of such bells, and from permitting the said bell or bells, or any of

them, to be tolled or rung so as to cause or occasion any nuisance, disturbance, or annoyance to the plaintiff and his family, residing in his dwelling-house at [*designating residence*].

409. Against obstructing lights: From rebuilding or completing, or improving the messuage or dwelling-house [*designating it*] or making or erecting any building or improvements whatsoever, or in such a manner as to darken, injure, or obstruct any of the [ancient] lights or windows of the plaintiff's messuages or tenements, or either of them [*designating them*] until the further order of the court.

410. Against undermining plaintiff's land: From excavating or removing any soil from any land adjoining the plaintiff's premises [*designating them*] which shall cause the plaintiff's land, by reason of the withdrawal of its lateral support, to fall away or subside.

411. Against stopping a way: From stopping up, obstructing, or injuring, or from continuing to stop up, obstruct, or injure the free passage of [*distinctly designating the way*].

412. Against erection, and to compel removal, of buildings: From continuing the projected buildings, or commencing any other buildings whatever, on the garden or plot of ground described as follows [*description*]: or any part thereof; and also from permitting such part of the said buildings as have been already erected on the said garden or plot of ground from remaining thereon.

413. Against authorizing the laying of a railroad in a city street: That an injunction-order may be issued by this court, directed to the said defendants, the mayor, and aldermen of the city of their counsellors, attorneys, solicitors, and agents, restraining and enjoining them, and each and every of them, and all others acting in aid or assistance of them, from granting, or in any way or manner authorizing J. . . . S. . . . and others, the persons named in a resolution, a copy of which is hereto annexed, or their associates, or any other person or persons whomsoever, the right, liberty, or privilege of laying a double or any track for a railway in said street from to, or any railway whatever in said street, or of breaking or removing the pavement, or in any other manner to obstruct the said street, preparatory to or for the purpose of laying or establishing any railway therein.

414. Against laying a railroad in a city street: From entering into, or upon and streets for the purpose of

laying or establishing a railroad therein, and from digging up or subverting the soil, or doing any other act in those streets tending to incumber them or to prevent the free and common use thereof, as the same have been heretofore enjoyed [until compensation shall have been made therefor, pursuant to the provisions of the statute].

415. Against violation of covenant to build: From erecting upon [*here designate the land*] any brewery, or other building, except one private house or ornamental cottage, to be erected on [*designating what part*].

416. Against contractor interfering with work after forfeiting his contract: From retaining possession of, or entering upon or interfering with, the main line of the plaintiff's railway from to and the branch line of railway from the main line to the intended junction with the M. . . . and L. . . . Railway at , and the work connected with the main and branch lines respectively; and from proceeding in any manner to construct, complete, or repair the works, by the contract of the . . . day of , 1. . 9, agreed to be constructed, completed, or repaired, or any of such works; and from removing, or causing or permitting to be removed, the materials of any description being on or about the said lines of railway and works, or any part thereof respectively, or any of such materials; and from in any manner interfering with or disturbing the possession or use or enjoyment by the company, their officers, contractors, agents, servants, or workmen of the said lines of railway and works or any part of the same respectively; and from in any manner obstructing or preventing the company, their officers, contractors, agents, servants, or workmen, from constructing, completing, or repairing the said works by the contract agreed to be constructed, completed, or repaired, or any of such works; and from in any manner interfering with or preventing the company, their officers, contractors, agents, servants, or workmen, in the use or employment of the said materials in constructing, completing, or repairing the works, or any of them.

417. Against underletting: From granting or making, or contracting to grant or make, any leases, underleases, or assignments of any part of the premises [*designating them*], demised by A. . . . B. . . . to C. . . . D. . . . by a lease dated on, &c.

418. Against carrying on business forbidden by lease: From carrying on the auction business, or selling goods at public auction, in the store No. street, in the city of ;

and from conducting therein any business other than the regular dry goods jobbing business.

419. Against transferring negotiable paper: From indorsing, assigning, or in any way transferring [*here describe the note or bill, e. g., thus: a bill of exchange drawn by M.... N.... upon the above-named A.... B...., for dollars, bearing date on or about the day of, 19.., and payable months after said date, and accepted by said A.... B....*]

420. Against transfer of stock: From selling, or transferring or incumbering, ... shares of the capital stock of the X.... Y.... company, standing on the books of the said company, in the name of A.... B....; and the said company are, in like manner, restrained from permitting such sale, transfer, or incumbering [and from paying any dividend thereon] without the order and direction of this court.

421. Against transferring assets: From selling, assigning, transferring, pledging, or otherwise disposing of, any of his property, except what is by law exempt from execution; or from in any manner interfering therewith until the further order of the court.

422. Against publishing book: From printing, publishing, or causing or being in any way concerned in the printing, publishing, or selling, or exposing to sale, or otherwise disposing of any copies of [*designate book*] or any other book purporting to be or resembling the book so printed, published and sold by or for the plaintiff [other than and except plaintiff's own selection, printed and published by plaintiff's order, and for plaintiff's use and benefit].

423. Against publishing private letter: From printing, publishing, circulating, or in any manner, either by writing or otherwise, making public a letter written by F.... N.... on or about the day of, 19.., and forwarded to O.... P.... at or any part thereof.

424. Against resuming practice, after having sold business: From practicing as an attorney or solicitor in any part of, either in his own name or in the name of any other person; and from endeavoring to induce any persons who were the clients of B.... & C.... to cease or abstain from employing A.... & B.... as their attorneys or solicitors.

425. Against disclosure of secrets by clerk: From taking or retaining any copies of, or extracts from any books, papers,

documents, or extracts of the above-named A.... B.... & Co., or either of them, in the possession, custody, or power of the defendant; and from communicating the said particulars, or the contents thereof, or any of the information therein contained, to any person or persons whatever; and from communicating any of the information possessed or acquired by him relating to the said copartnership, or the affairs or secrets thereof, or the clients thereof, by means of his having been employed as accountant or clerk by said A.... B.... & Co., and having access to said books, papers, and documents.

426. Against use of a secret in trade, by one who acquired it in violation of contract: From selling, or causing or procuring to be sold, under the title and designation of "Morison's Universal Medicine" or "Morison's Vegetable Universal Medicine," any medicine made or manufactured by the defendant, or by or under his order or direction; and from making or compounding any medicine according to the secret in the complaint mentioned, &c.; and from in any manner using the secret of compounding the said medicines, or any part thereof.

427. Against infringement of trademark: From selling or exposing for sale, or procuring to be sold, any composition or blacking described as, or purporting to be, blacking manufactured by Day & Martin, in bottles, having affixed thereto such labels, as are mentioned in the complaint, or any other labels, so contrived or expressed as, by colorable imitation or otherwise to represent the composition or blacking sold by the said defendant to be the same as that manufactured and sold by the plaintiff; and from using trade-cards, so contrived or expressed as to represent that any composition or blacking sold, or proposed to be sold by the defendant, is the same as that manufactured or sold by the plaintiff.

428. Against infringement of sign: From running or in any manner using or causing to be used, for the conveyance of passengers, any omnibus, having painted, stamped, printed, or written thereon the words or names "London Conveyance," or "Original Conveyance for Company," or any other names, words, or devices painted, stamped, printed, or written thereon, in such manner as to form or to be a colorable imitation of the names, words, and devices painted, stamped, printed, or written on the omnibuses of the plaintiffs.

429. In creditors' actions: From selling, assigning, or transferring, receiving, collecting, discharging, or incumbering, or

in any manner disposing of or interfering with any property, real or personal [not exempt by law from execution], things in action, or other equitable property or interests, of any kind whatever, held or controlled by him, or by any other person held in trust for him or for his use and benefit, or in which he has any interest whatever. [*And where the complainant seeks to reach the surplus proceeds of a trust beyond what is necessary for the debtor's support, except where such trust has been created by, or the fund so held in trust has proceeded from, some person other than the said defendant, add*]: And said defendant and his agents are further enjoined from receiving or using, or suffering to be applied to his use, any more of [*here designate fund or income*] than the [annual sum or rate of dollars].

And said defendant and his agents are further enjoined from making any assignment of his property, and from confessing any judgment, for the purpose of giving preference to any other creditor over the plaintiff, or from doing any other act or thing to enable other creditors or persons to obtain any portion of his said property.

430. Against entering confession of judgment: From entering up judgment on a warrant of attorney [*or*, statement of confession] executed by the plaintiff, A.... B...., to the defendant, Y.... Z.... [*or otherwise naming the parties*], and dated on or about the day of, 19.., and from commencing any proceedings thereon.

431. In partnership causes: To restrain the defendant Y.... Z...., from selling, assigning, or transferring, receiving, collecting, discharging, or incumbering, or in any manner disposing of or interfering with any portion of the property, real or personal, of the copartnership heretofore [and now] existing between the plaintiff and defendant, and of which an accounting is sought in this action, or of the debts, accounts, and demands, contracts bills, bonds, notes, or evidences relating thereto, things in action, or other equitable property or interests and effects of any kind whatever of said copartnership, or in which they have an interest, and from doing, or suffering to be done, any act or thing to enable any person to obtain any portion of said property.

432. Another form; where dissolution is not sought: From applying any of the moneys and effects of the copartnership otherwise than in the ordinary business, and from obstructing or interfering with the plaintiff in the exercise and enjoyment of his rights under the partnership articles.

433. Against the reorganization of a corporation: That the said corporation, and the agents and officers thereof, be restrained from conveying, assigning, or making over the real and personal property of the society, or any part thereof, to any person or persons, upon and for the purposes [*designating those intended*] or any of such purposes, or in any other manner, in furtherance of the intention of the society to surrender the existing charter; and from affixing the common seal of the society to any deed or instrument for such purposes, or any of them; and from surrendering the existing charter, and affixing the common seal of the society to any deed or instrument for that purpose; and from accepting a new charter, or any charter, inconsistent with the existing charter of the society.

434. Against railroad company interfering with construction of cross-road: From interfering with or obstructing, hindering or preventing the plaintiffs, their servants, &c., from making and constructing the said bridge across and over the said branch of the railway, in the line or course prescribed by and of the materials, and in the manner specified and directed by; and they are in like manner restrained from continuing to maintain and uphold the walls [*describing them*] erected by the said defendants, or any other walls, &c., whereby the plaintiffs, their agents, &c., may be prevented from constructing the said platform, and from making up and completing the said bridge, and from pulling down, taking up, or removing any scaffolding or other works or materials to be made, deposited, or laid down by the plaintiffs, their servants, &c., on the sides or slopes of the said Railway, for the purpose of making and constructing the same bridge; and from preventing or hindering the agents, servants, or workmen of the plaintiffs from passing across the said last-mentioned railway, at proper and seasonable times during the progress of the said works, for the purposes thereof, and taking down or removing [*if necessary*] any such walls, &c. [the plaintiffs undertaking, during the progress of the said works, and every of them, not in any manner to interfere with or obstruct the traffic upon said Railway, and not in any respect to injure or damage the said Railway, or the works thereof and undertaking to make and pay satisfaction to the defendants for any injury or damage which may be sustained by the defendants, by or from any temporary use of their land on the sides or slopes of the said railway.

435. Against usurping office and taking the fees: From molesting, interfering with, or disturbing the plaintiffs, or any of

them, in the use, enjoyment, or exercise of the said duties respectively appertaining to the plaintiffs as the master and wardens of the port of and their clerk; and from taking the fees thereof, and from demanding or receiving fees or emoluments from any person or persons for any such services; and from acting as surveyors of any vessel deemed unfit to proceed to sea, and from judging or acting as judges of the repairs which might be necessary for the safety of such vessel on the intended voyage; and from selling, under their inspection, vessels or goods arriving at the port of damaged, and for the benefit of underwriters out of the city of; and from certifying the cause of such damage, the amount of sale of such vessel or goods, and the charges attending the sale; and from taking or making any survey on board of any ship or vessel, or at any store in the city of or along the docks or wharves thereof, or damaged goods; and from giving or granting any certificate in consequence of damaged goods; and from taking or making any survey on board of, or relating to, any ship or vessel put into the port of in distress, to ascertain the damage sustained thereby, and whether any such ship or vessel shall pay or be liable to foreign duties and tonnage, or otherwise.

436. Against proceedings at law, in ejectment: To restrain the defendant Y.... Z.... from proceeding further against the plaintiff A.... B.... in the action commenced against him in the court of this state, for the recovery of the possession of [*designating the premises*] with their appurtenances; and also from instituting or proceeding in any new or other action at law for the recovery of the possession of said premises, or any part thereof.

437. The same; in action on contract: To restrain the defendant, Y.... Z...., from proceeding further in his action at law against A.... B...., above named, upon the bond of the said A.... B...., dated the day of, 19..; and from instituting or proceeding in any new or other action at law upon such bond; and from commencing any action or actions against the plaintiff for the recovery of [*designating the alleged debt.*]

438. The same, with leave to proceed to judgment: [*Proceed as above, adding*]: But you are at liberty, without prejudice to the equitable rights of the plaintiff, to proceed to judgment only in the suit at law which you have commenced against the said A.... B.... notwithstanding this injunction.

439. Against proceedings for dispossession: From taking any proceedings to dispossess the plaintiff from the house and lot No. street, in the city of, and particularly from issuing any warrant of removal, or taking possession under proceedings commenced before Judge N.... M...., of the county of, on the ground that the demised premises were deserted by the tenant [*or, that rent was unpaid*].

440. Order granting writ (Minn. Rev. Laws 1905 sec. 4260).¹

[*Title of court and of cause.*]

On reading and filing the verified complaint in this action, and the affidavit of E.... F...., from which it satisfactorily appears that sufficient grounds exist for the issuance of a temporary injunction restraining the defendant from [*here specify act or acts to be enjoined*];

On motion of L.... M...., attorney for the plaintiff;

IT IS ORDERED that such writ be granted and that the same issue out of this court, and that the plaintiff give a bond with two sufficient sureties in the penal sum of dollars, to be approved by the undersigned, conditioned as provided by law [*or insert provisions required*].

Dated, 19..

N.... O...., Judge.

441. Bond for injunction (Minn. Rev. Laws 1905 sec. 4261).

[*Title of court and of cause.*]

KNOW ALL MEN by these presents that we, A.... B...., as principal, and G.... H.... and J.... K...., as sureties, are held and firmly bound unto C.... D...., defendant in the above entitled action, in the sum of dollars lawful money of the United States, to be paid unto the said C.... D...., his heirs, executors, administrators or assigns, for which payment well and truly to be made we jointly and severally bind ourselves and each of our heirs, executors and administrators, firmly by these presents.

THE CONDITION of this obligation is such that, whereas the above named plaintiff has duly applied for a writ of in-

¹ In Minnesota an injunction *pendente lite* must be in the form of a writ; hence, it must be allowed by the court or judge substantially as in the form here given, and the writ thereupon issues as in Form 442.

Note also that the security given

in Minnesota must be by bond instead of undertaking. In other respects the practice in Minnesota is substantially similar to that in Wisconsin, and the forms previously given in this chapter for use in that state may be adapted for use in Minnesota.

junction against said defendant in this action, according to the statute in such case provided;

Now, therefore, if the said plaintiff shall pay the said defendant such damages as he sustains by reason of said writ if the court finally decide that the said plaintiff is not entitled thereto, then this obligation shall be void; otherwise to remain in full force.

IN TESTIMONY WHEREOF we have hereunto set our hands and seals this day of, 19..

G.... H.... [Seal]

Signed, sealed and delivered J.... K.... [Seal]
in presence of:

P.... Q....

R.... S....

[*Venue.*]

On this day of, 19.., before me, a notary public within and for said county, personally appeared A.... B...., G.... H.... and J.... K...., to me known to be the persons described in and who executed the foregoing and within instrument, and acknowledged that they executed the same as their free act and deed.

W.... X...., Notary Public.

[*Venue.*]

G.... H.... and J.... K.... being duly sworn, each for himself says that he is one of the sureties above named; that he is a resident and freeholder of the state of Minnesota, and worth the amount of dollars, above his debts and liabilities, and exclusive of his property exempt from execution.

G.... H....

J.... K....

[*Jurat.*]

I hereby approve the within and foregoing bond, and the sureties thereon.

N.... O...., Judge.

442. Writ of temporary injunction (Minn. Rev. Laws 1905 sec. 4258).

[*Title of court and of cause.*]

THE STATE OF MINNESOTA

to the defendant C.... D....

WHEREAS the plaintiff, A.. B...., has made application for the issuance out of this court of a writ of injunction restraining you, the said defendant, from [*here state the act to be enjoined*];

And whereas the said injunction has been granted and allowed

by [*name officer granting writ*] on the filing of a bond, duly approved, which has been done;

NOW, THEREFORE, you, the said defendant, are hereby commanded and enjoined to forthwith refrain from [*here state particularly the act enjoined*].

And this injunction you will observe under the penalty of the law.

[SEAL]

WITNESS the Honorable N.... O....
Judge of the District Court aforesaid,
at, this day of,
19..

R.... S...., Clerk.

443. Notice of application for temporary injunction (Iowa Code secs. 4358, 4359).

[*Title of court and of cause.*]

To C.... D...., defendant:

You are hereby notified that the above named plaintiff, on the day of, 19.., filed in the clerk's office of the court his petition claiming [*here state the nature of the action and the remedy sought*] and that said plaintiff has applied to the court [*or, judge*] for an order for a temporary injunction enjoining and restraining you from [*here state particularly the act or acts to be enjoined*];

And that the said action will be heard before the said court [*or, judge*] on the day of, 19.., at [*specify place of hearing*] at which time and place you may appear and show cause against said application if you think proper.

Dated, 19..

E.... F...., Plaintiff's Attorney.

444. Order allowing injunction, to be endorsed on the petition (Iowa Code sec. 4362).

[*Venue.*]

Upon reading the within petition and the accompanying affidavit of E.... F.... [*if a hearing has been had add: and after hearing the parties*], it satisfactorily appearing that the plaintiff is entitled thereto;

IT IS ORDERED that a writ of injunction issue out of this court restraining the defendant from [*here state act or acts enjoined*], upon the filing of a bond in the office of the clerk of the court named in the petition, conditioned as required by law, in the penalty of dollars, with sureties to be approved by said clerk.

Dated this day of, 19..

N.... O...., Judge.

445. Bond on injunction (Iowa Code secs. 4363, 4364, and 4365).

[*Title of court and of cause.*]

KNOW ALL MEN by these presents that we, A.... B...., principal, and G.... H.... and J.... K...., sureties, are held and firmly bound unto C.... D.... in the penal sum of dollars, lawful money of the United States, well and truly to be paid to the said C.... D.... and to his heirs, executors and assigns.

THE CONDITION of the above obligation is such that, whereas the said A..... B..... has this day [*or, on the day of, 19..*] filed in the office of the clerk of the district court of the state of Iowa, in and for county, a petition praying the issuance of an injunction to restrain the defendant from [*here state act or acts to be enjoined*]; and whereas on the day of, 19.. the Honorable N.... O...., Judge of [*name court*] made an order on said petition allowing said writ of injunction;

Now, therefore, if the said A..... B..... shall and will pay all the damages which may be adjudged against him by reason of such injunction [*if proceedings in a civil action, or on a judgment or final order are sought to be enjoined, then add the following*: and will also pay the said judgment, *or*, will comply with said order if the injunction is not made perpetual, *or*, will pay any judgment that may be ultimately recovered against said plaintiff]; then this obligation to be void; otherwise to be and remain in full force and virtue.

Dated this .. day of, 19..

A.... B...., Principal.

G.... H...., J.... K...., Sureties.

[*Add justification and approval by clerk.*]

446. Writ of injunction (Iowa).

[*Title of court and of cause.*]

THE STATE OF IOWA to C.... D...., defendant.

Whereas A.... B...., as plaintiff, has this day filed in the office of the clerk of the district court of the state of Iowa in and for county a petition duly verified in the above entitled action, praying that C.... D...., the defendant, be restrained from [*state the acts sought to be enjoined*].

And whereas the Hon. N.... O...., Judge of [*name of court*] has this day made an order allowing said writ of injunction to issue upon the filing of a bond, with sureties, pursuant to said order; and whereas said order has been complied with, and such bond filed, and sureties approved;

NOW, THEREFORE, you, the said C.... D...., defendant as aforesaid, your agents and servants, are hereby strictly enjoined and restrained from [*here state at length the acts sought to be enjoined*] until the further order of our district court in the premises. And this injunction you must strictly observe, under the penalties of the law.

WITNESS W.... X...., clerk of said court, with the seal thereof hereto affixed, this day of, 19..

W.... X....
Clerk.

[SEAL]

447. Order granting injunction, to be endorsed upon petition (Cobbey's Ann. Stats. of Nebr. sec. 1231).

[*Venue.*]

Upon reading the within petition and the accompanying affidavit of E.... F.... [*if a hearing has been had, add: and after hearing the parties*] it satisfactorily appearing that the plaintiff is entitled thereto;

IT IS ORDERED that an order of injunction be and is hereby granted in this action, and that the same be issued by the clerk of the court of county, enjoining and restraining the defendant, C.... D.... from [*here state act enjoined*] during the pendency of this action or until further order in that behalf made;

And it is further ordered that the plaintiff give an undertaking executed by two sufficient sureties to be approved by the said clerk in the sum of dollars, conditioned as required by law.

Dated, 19..

I.... K...., Judge.

448. Order of injunction (Cobbey's Ann. Stats. of Nebr. sec. 1235).

[*Title of court and of cause.*]

To C... D...., the defendant above named.

WHEREAS an application by the above named plaintiff for an order of injunction in this action has been duly granted, and the said plaintiff has given the undertaking required by law and by the order of allowance, which undertaking has been duly approved;²

NOW, THEREFORE, it is hereby ordered that you and your agents and servants be, and you are hereby, enjoined and re-

² The form of undertaking given heretofore in this chapter for use in Wisconsin may be used in Ne-

braska with such slight change of wording in the condition as the statute necessitates.

strained from [*here state act or acts enjoined*] until further order in this behalf made.

WITNESS my hand and the seal of said court this day of, 19..

[SEAL]

L.... M....,
Clerk of [*name court*].

449. Affidavit for modification or vacation of temporary injunction.

[*Title of court and of cause.*]

[*Venue.*]

C.... D.... being duly sworn says that he is the defendant in this action and that on the day of, 19.., he was enjoined by order of this court [*or, by order of J.... K...., Judge, &c.*] from [*here state act enjoined*]; and

That the said [*order, or writ of*] injunction was granted without notice to the defendant;

That the affiant has fully and fairly stated the case in this action to L.... M...., his counsel, who resides at [*in said county*] and that upon the statement thus made he is advised by said counsel that he has a valid and substantial defense to this action, and to the whole thereof.

And that [*here state the facts which furnish grounds for the modification or vacation of the injunction*].

And affiant makes this affidavit for the purpose of moving that the said injunction be vacated [*or, modified so as to permit and allow, stating what*].

C.... D....

[*Jurat.*]

450. Notice of motion to vacate or to modify injunction.

[*Title of court and of cause.*]

PLEASE TAKE NOTICE that on the defendant's answer and the affidavit of E.... F...., attached hereto, the undersigned will move the court, at a special term to be held at, on the day of, 19.., at o'clock in the noon, or as soon thereafter as counsel can be heard [*or will move before, designating the judge who granted the order, at his office in the city of, on the day of, 19.., at o'clock in the noon*] that the injunction issued in this action be vacated [*or be modified so as to permit defendant to, &c.*] with costs; and for such other or further relief as may be just.

Dated, 19..

L.... M....
Defendant's Attorney.

[*Address to plaintiff's attorney.*]

451. Order vacating or modifying injunction.

[*Title of court and of cause.*]

The motion of the defendant herein, to vacate [*or modify*] the injunction heretofore granted in this action, dated, 19.., coming on to be heard before me, at chambers [*or before the court*] and on reading the complaint, the injunction, and the papers on which the same was granted herein, and the affidavits of G.... H.... and J.... K.... in support of this motion [*and also the verified answer of the defendant*], and after hearing W.... X...., defendant's attorney for the motion, and Y.... Z...., plaintiff's attorney, against it;

IT IS ORDERED that the said injunction be, and the same is hereby wholly vacated. [*Or if it be modified: that the said injunction be modified as follows, here specifying the modification*].

Dated, 19..

By the Court:

[*if order be made by the court*].

L.... M...., Judge.

452. Notice of motion for reference to ascertain damages.

[*Title of court and of cause.*]

PLEASE TAKE NOTICE that on the undertaking and all of the files, records, and proceedings in this cause, the undersigned will move the court, at a special term to be held at, on the day of, 19.., at o'clock in the . . . noon, or as soon thereafter as counsel can be heard, * for a reference to ascertain the damages sustained by the defendant by reason of the injunction granted in this cause, on the day of, 19..; and for such other or further order as may be just, and for the costs of this motion.

Dated, 19..

L.... M....

Defendant's Attorney.

[*Address to Plaintiff's Attorney.*]

453. Order of reference.

[*Title of court and of cause.*]

On reading and filing the notice of motion made by the defendant herein for an order of reference to ascertain the damages sustained by the defendant by reason of the injunction heretofore granted in this action, and upon all the files, records and proceedings in this action, and upon motion of L.... M...., counsel for defendant, after hearing N.... O...., counsel for the plaintiff;

IT IS ORDERED that it be referred to Q.... R.... to ascertain the damages sustained by the defendant by reason of the said injunction, and to report the same to the court [and that day's notice of the hearing be given to G.... H.... and J.... K...., the sureties named in the undertaking given on obtaining said injunction].

Dated, 19..

By the court:

W.... X...., Judge.

454. Notice of motion to confirm report of referee.

[*Title of court and of cause.*]

[*Proceed as in Form 462 to the * and continue*]: to confirm the report of the referee appointed on the .. day of, 19.., to ascertain the defendant's damages by reason of the injunction heretofore granted in this action [and for judgment thereon against the sureties]; and for such other and further relief as may be just.

[*Date.*]

L.... M....

Defendant's Attorney.

[*Address to plaintiff's attorney and to sureties.*]

455. Order confirming referee's report.

[*Title of court and of cause.*]

On reading and filing the annexed order to show cause [or notice of motion] and upon all the files, records and proceedings in this action, and the referee's report, and the evidence on which the same was founded, and on motion of L.... M.... for the defendant, and after hearing O.... P.... for plaintiff and for [the sureties], in opposition;

ORDERED that the said report of the referee herein be, and the same hereby is, in all respects confirmed [except as to the item of dollars, paid by the defendant to the sheriff for his services in taking possession of the property, and attending to sell the same; and as to that item, that it be reduced to dollars and that on the defendant's consenting to such reduction the report be thereon confirmed] with dollars costs of this motion.

By the court:

X.... Y...., Judge.

CHAPTER XV.

RECEIVERS.

- | | |
|--|---|
| <p>456. Notice of motion for receiver.</p> <p>457. Order to show cause why receiver should not be appointed.</p> <p>458. Order appointing receiver, by the court.</p> <p>459. Order appointing receiver for partnership.</p> <p>460. Order appointing receiver in foreclosure.</p> <p>461. Bond of receiver.</p> <p>462. Assignment of partnership assets to receiver.</p> <p>463. Notice of motion to instruct receiver.</p> <p>464. Receiver's petition for leave to sell real estate.</p> <p>465. Notice of receiver's motion for instructions as to distribution.</p> <p>466. Application of receiver to pay dividend.</p> <p>467. Notice of motion to revoke appointment of receiver.</p> <p>468. Order revoking and appointing new receiver.</p> | <p>469. Notice of motion to discharge receiver.</p> <p>470. Affidavit to receiver's account.</p> <p>471. Notice of application for receiver (Iowa).</p> <p>472. Order appointing receiver (Iowa).</p> <p>473. Bond of receiver (Iowa).</p> <p>474. Receiver's oath (Iowa).</p> <p>475. Plaintiff's undertaking on <i>ex parte</i> application for appointment of receiver (North Dakota and South Dakota).</p> <p>476. Receiver's oath (North Dakota and South Dakota).</p> <p>477. Receiver's undertaking (North Dakota and South Dakota).</p> <p>478. Notice of application for receiver (Nebraska).</p> <p>479. Order appointing receiver (Nebraska).</p> <p>480. Bond of applicant for appointment of receiver (Nebraska).</p> <p>481. Bond of receiver (Nebraska).</p> |
|--|---|

456. Notice of motion for receiver.

[*Title of court and of cause.*]

TAKE NOTICE that upon [*here designate motion papers, e. g. thus:* the verified complaint in this action and upon the affidavits of W.... X.... and Y.... Z...., copies of which are herewith served upon you, and upon all the papers and proceedings heretofore filed or served] the undersigned will move the court, at a special term to be held at on the day of, 19.., at o'clock in the noon, or as soon thereafter as counsel can be heard, for the appointment of a receiver of the rents and profits of the estate of the defendant [*or* of all the partnership property of A.... B.... and C.... D.... of the firm of A.... B.... & Co.] mentioned in the said complaint,

with the usual powers and duties, and with power to [*here specify any particular power or duty specially desired in the case*] and for such other relief as may be just.

Dated, 19..

To N.... O....,
Defendant's Attorney.

L.... M....
Plaintiff's Attorney.

457. Order to show cause why receiver should not be appointed.

[*Title of court and of cause.*]

Upon the verified complaint herein and the affidavits of W.... X.... and Y.... Z...., copies of which are directed to be served with this order, and upon all the papers and proceedings heretofore filed or served in this action, let the defendant show cause, on the day of next, 19.., at o'clock in the noon, before this court, at a special term to be held at the court house in the of on that day, or as soon thereafter as counsel can be heard, why a receiver should not be appointed of the [*designate the property briefly*] with the usual powers and duties, and with power to [*here specify any particular or unusual power desired*] and why the plaintiff should not have such other relief as may be just.

Dated, 19..

R.... S...., Judge.

458. Order appointing receiver, by the court.

[*Title of court and of cause.*]

Upon the summons and complaint in this action, and the affidavits of W.... X.... and Y.... Z...., and upon all the papers and proceedings heretofore filed or served herein [and on due proof of service of notice of this motion, no one appearing to oppose] and on motion of L.... M...., of counsel for the plaintiff [*the clause in brackets above may be omitted; if it be added*]: and after hearing N.... O...., of counsel for the defendant; *

ORDERED that P.... Q...., of, counsellor at law, be and hereby is appointed receiver of [*designating property briefly*] upon the said receiver executing, acknowledging, and filing with the clerk of this court a bond, in the usual form, to the clerk of this court and his successors in office, in the penalty of dollars, with two sufficient sureties, who shall justify as in cases of arrest and bail, to be approved as to its form and manner of execution by this court; and upon the due qualification of said receiver,

It is further ordered, that he be vested with all the usual powers and rights of receivers appointed by this court, and with power to [*here specify particular power to be exercised*].

Dated, 19..

By the court:
R.... S...., Judge.

459. Order appointing receiver for partnership.

[*Proceed as in Form 458 to the * and then continue*]:

ORDERED that P.... Q.... of in county, be and he is hereby appointed receiver to collect and receive the outstanding debts and moneys due to, or on account of the partnership business of the late firm of A.... B.... & Co., transacting business at, and also to receive and take possession of all the stock in trade, effects and property, of every nature and kind, of or belonging to the said partnership, upon his filing a bond executed to the clerk of this court and his successors in office, in the penal sum of dollars, with sufficient sureties, who shall justify as in case of arrest and bail, and be approved by the court, conditioned for the faithful discharge of the duties of such receivership in the usual form.

And let the plaintiff and defendant forthwith upon such qualification of said receiver, deliver over to him all the stock in trade, effects and property of every kind and nature, of or belonging to said partnership, in their possession and subject to their control, or in the possession and control of either of them, and all moneys, bills of exchange, notes, drafts, checks or other evidences of debt due or owing to said partnership, all books of account, accounts, receipts, vouchers and papers of every nature belonging to said partnership business or pertaining thereto.

Further ordered that said receiver continue the business of said firm in selling for cash the stock in trade in the present course of business by retail, and as rapidly as possible, without sacrifice, to convert the said stock into money. That as such receiver he have power to sue for and collect all debts or demands due said firm, and to compromise and settle the same if in his judgment such a course be necessary or advisable; to lease any real estate of said firm for a term not exceeding one year; to finish unmanufactured stock if he deem that course for the best interest of the parties; to sell at auction all desperate or doubtful claims, upon ten days public notice thereof, and [*insert any other special power desired*].

Dated, 19..

By the court:
R.... S...., Judge.

460. Order appointing receiver in foreclosure.

[Insert recitals as in Form 458, and proceed]:

It appearing satisfactorily that the mortgaged premises are inadequate security for the mortgage debt, and that the persons personally liable therefor are insolvent;

ORDERED that R.... C.... of in said county be, and he is hereby appointed receiver in this action of the rents and profits of the mortgaged premises described in the complaint, upon his filing a bond executed to the clerk of the court and his successors in office in the penal sum of dollars, with sufficient sureties, who shall justify as in case of arrest and bail and be approved by the court conditioned for the faithful discharge of the duties of such receiver in the usual form.

Further ordered that said receiver be, and is hereby empowered and directed:

1. To demand, collect and receive all rents for said premises, or any part thereof due and unpaid by tenants, or others, or hereafter to become due.

2. To rent or lease, from time to time not exceeding months, any part of said premises, and to keep the buildings thereon insured and in repair, and to pay the taxes and assessments upon said premises accruing during his receivership.

3. To bring and prosecute all proper actions for the collection of rents due on said premises, as well as all necessary actions and proceedings for the removal of tenants in default, or other persons, from said premises and to bring and prosecute all proper actions for the protection of said premises, or to recover possession thereof.

4. To employ an agent to collect said rents, manage said premises and keep the same insured and in repair if he shall deem necessary, and to pay the reasonable value of such services out of the rent received.

Further ordered that all persons now in possession of any part of said premises and not holding under valid leases do forthwith surrender possession thereof to said receiver, and that all tenants in possession of such premises, and such other person or persons as may be lawfully in possession thereof, do and they hereby are directed to attorn as such tenant or tenants to said receiver, and until the further order of the court, pay over to such receiver all rents of such premises now due and unpaid or that may hereafter become due, and that all persons liable to such rents are hereby enjoined and restrained from paying any rent for such premises to the defendant, his agents, servants or attorneys.

Further ordered that during the pendency of this action the

defendant and his agents and attorneys be enjoined and restrained from collecting the rents of said premises, and from interfering in any manner with the property or its possession, and that the said receiver retain the moneys which may come into his hands by virtue of his said appointment, until the sale of the premises mentioned in the complaint under the judgment to be entered in this action, and that he then, after deducting his proper fees and disbursements therefrom, apply the said moneys to the payment of any deficiency there may be of the said] amount directed to be paid to the plaintiff in and by the said judgment, and in case there be no such deficiency, that he retain the said moneys in his hands until the further order of the court in the premises.

Further ordered that the said receiver and any party hereto may at any time, on proper notice to all parties who may have appeared in this action, apply to this court for further or other instructions, and for further power necessary to enable said receiver properly to fulfill his duties.

By the court:
R.... S...., Judge.

461. Bond of receiver.

KNOW ALL MEN that we, P.... Q...., principal, and G.... H.... and J.... K...., sureties, all of in county, ..., are held and firmly bound unto W.... X...., clerk of the circuit court in and for county, ... in the sum of dollars, to be paid to said clerk, his successor in office, or assigns, for which payment, well and truly to be made we, and each of us, bind ourselves jointly and severally, and our respective heirs, executors and administrators, firmly by these presents.

WHEREAS, by an order of the circuit court for county, made on the .. .day of, 19.., in an action therein pending wherein A.... B.... is plaintiff and C.... D.... defendant, it was among other things ordered that the above bounden P.... Q.... be appointed receiver of all the property, effects, things in action, of the firm of A.... B.... & Co., a partnership, with powers and duties set forth in said order, and that he be vested with all rights and powers as such receiver, upon filing a bond for the faithful performance of his duties, in the penal sum of dollars;

NOW, THE CONDITION hereof is such that if the said P.... Q.... shall duly account for what shall come to his hands or control as such receiver, and pay and apply the same from time to time, as he may be directed by said court, and shall obey such

orders as the court may make in relation to such trust, and faithfully perform all his duties as such receiver, then this obligation to be void; otherwise of force.

Signed, sealed and delivered
in presence of:

P.... Q.... [Seal]

G.... H.... [Seal]

J.... K.... [Seal]

[Two witnesses]

[Add acknowledgment if required by statute or rules (Minn. Dist. Court Rules I) and justification of sureties as in case of arrest and bail.]

462. Assignment of partnership assets to receiver.

THIS INDENTURE, made the day of, 19.., between A.... B.... and C.... D...., heretofore partners in trade, doing business in the city of under the style of A.... B.... & Co. of the first part; and R.... C...., of &c., receiver of the estate and effects hereinafter referred to, appointed by the court of of the second part;

Whereas, in and by an order of the said court, before, &c., in a certain action wherein the said A.... B.... was plaintiff and the said C.... D.... was defendant it was ordered that said R.... C.... be appointed receiver of the estate and property of said partnership, with powers as in the order of appointment contained; and whereas the said party of the second part has given and filed the requisite security, pursuant to the rules and practice of the said court, and to the provisions of the said order;

Now, this indenture witnesseth that the said parties of the first part, in obedience to the said order and in consideration of the premises aforesaid and of one dollar to each of them in hand paid by the said party of the second part, at or before the execution hereof, the receipt whereof is hereby acknowledged, have, and each of them has, conveyed, assigned, transferred, and delivered over, and by these presents do, and each of them does, convey, assign, transfer and deliver over unto the said party of the second part, under the direction of the said referee, testified by his approval indorsed hereon, all and every the stock in trade, good will, estate real and personal, chattels-real, moneys, outstanding debts, things in action, equitable interests, property, and effects whatsoever and wheresoever, of or belonging or due to the said firm, or to the said parties of the first part as partners therein, or in which the said firm, or they or either of them as such partners had any estate, right, title or interest at the time of filing the complaint in said action, to-wit, on the day of

..... last; and also all deeds, writings, leases, muniments of title, books of account, papers, vouchers, and other evidences whatsoever relating or appertaining thereto;

To have and to hold the same unto him, the said party of the second part, as such receiver as aforesaid, and to his successors and assigns, subject to the order, direction, and control of the said court. And for the better and more effectually enabling the said party of the second part, his successors and assigns, to recover and receive all or any part of the stock, estate, book-debts, property, choses in action, and effects hereby conveyed, assigned and transferred, they, the said A.... B.... and C.... D.... have made and appointed, and by these presents do make and appoint the said R.... C...., party of the second part, his successors and assigns, the attorney and attorneys of them, the said parties of the first part, in their names, or in his own name, to commence, continue, discontinue, and again bring, perfect, and carry out actions and suits against any persons or corporations, for or on account of all or any part of the said estate, stock, property, book-debts, choses in action or effects.

IN WITNESS WHEREOF the said parties of the first part have hereunto set their hands and seals the day and year first above written.

Signed and delivered in
the presence of:

A.... B.... [Seal]
C.... D.... [Seal]

[Two witnesses.]

[Acknowledgment.]

463. Notice of motion to instruct receiver.

[Title of court and of cause.]

PLEASE TAKE NOTICE that on the pleadings and all the papers and proceedings filed or served in this action, and on the petition of R.... C...., a copy of which is attached hereto [or otherwise describe papers on which motion is based] the undersigned will move the court, at a special term to be held at on the day of, 19.., at o'clock in the ... noon, or as soon thereafter as counsel can be heard, for an order directing the receiver heretofore appointed in this action [*here specify what directions are sought, e. g. thus:* to proceed in the further discharge of his trust in disposing of the partnership property and effects; and that he be authorized and directed to sell the entire stock in trade of said copartnership at private sale, to E.... F.... at the sum agreed upon, to-wit [*stating terms*] and take from him his endorsed notes for one-half of the purchase

money, payable at, &c. [*or otherwise state the authority desired*]
and for such further order as may be just.

Dated, 19..

To N.... O....,
Defendant's Attorney.

L.... M....
Plaintiff's Attorney.

464. Receiver's petition for leave to sell real estate.

[*Title of court and of cause.*]

To the court of

THE PETITION of R.... C...., receiver in this cause,
shows:

I. That having been appointed by order of this court on the day of, 19.., receiver of [*briefly designate estate*] your petitioner gave the requisite bond, with surties, which was duly approved and filed, and he is now acting in the discharge of the said trust.

II. That it appears that the defendant is owner of certain real property known and described as follows: [*description of the premises, and state also what interest the defendant has in it, what incumbrances there are upon it, and its value*].

III. [*State reasons for asking a sale, e. g. thus:*] That your petitioner has found no goods, or chattels, or choses in action of the said C.... D...., out of which any money can be made by collection, suit, or sale; and the said land is the only available property.

WHEREFORE your petitioner asks an order allowing him, as such receiver, to sell by public auction, and convey, all the right, title and interest of the said C.... D.... of and in the said land; and that the said C.... D.... join in such deed if the purchaser require it; and for such other or further order as may be just.

R.... C...., Receiver.

[*Jurat.*]

465. Notice of receiver's motion for instructions as to distribution.

[*Title of court and of cause.*]

TAKE NOTICE that upon the petition, of which a copy is attached and served upon you, I shall apply to the court, at, on the day of, 19.., at o'clock in the noon, for an order directing what course I am to take in reference to the uncollected notes and accounts, and the furniture in my possession, and also for an order directing a reference to take my accounts as receiver, and discharging me from liability, and also for an order determining your respective priori-

ties, and my duties as to paying your various claims out of the surplus that may remain in my hands, or out of any other moneys that I may collect.

Dated, 19..

R.... C...., Receiver.

To [*name attorneys of all parties interested.*]

466. Application of receiver to pay dividend.

[*Title of court and of cause.*]

And now comes R.... C...., the receiver appointed by this court in this action, by order dated, 19.., and respectfully shows to the court:

That the property which came to the hands of your petitioner by virtue of his receivership consisted of [*here state same in general terms*] and that your petitioner has realized therefrom by means of sales thereof up to the present time the sum of dollars;

That schedule "A" attached hereto is a true list of the creditors of said [*name debtor*] [who have come in and are entitled to share in the avails of this suit; *or, in case of a general dividend*, who have come to the knowledge of your petitioner, and the amount due to each];

That, while there remains part of the said property not yet collected or converted into money, the sum above mentioned is now available for dividend.

YOUR PETITIONER PRAYS that he be ordered to make a dividend among such creditors as are entitled to share therein [and that he be authorized to notify them to make proof of their claims. *This last clause to be added if the dividend is to be generally among all the creditors.*]

R.... C...., Receiver.

[*Verification.*]

467. Notice of motion to revoke appointment of receiver.

[*After recitals showing papers on which the motion is founded, and time and place of hearing, the object of the motion may be stated thus*]: that the said appointment of R.... C.... as receiver may be revoked; and that the court appoint a new receiver in this action, and take the requisite security.

468. Order revoking and appointing new receiver.

[*After recitals*]: That the order of this court dated, 19.., appointing R.... C.... receiver in this action be, and the same is hereby revoked and set aside; and that J.... S.... of be, and he is hereby appointed receiver in place of said

R.... C.... with the usual powers of receivers [*here insert requirements as to security and statement of specific powers as in original order*].

469. Notice of motion to discharge receiver.

[*The object of motion may be stated thus*]: that R.... C...., the receiver appointed in this action be discharged; and that on an accounting by him and a delivery of all property and other things held by him as such receiver, to be made as the court may direct, the bond entered into by him, the said receiver, and his sureties, may be vacated [and that the plaintiff may pay him, the said receiver, the sum of dollars, reported due to him by the report of dated the day of, 19.., pursuant to an order made in this cause the day of, 19..; and for the costs of this motion].

470. Affidavit to receiver's account.

[*Venue.*]

R.... C.... being first duly sworn, says that he is the receiver who makes the within and foregoing account; that said account is true and correct according to the best of his knowledge and belief; that it contains a full and correct statement of all moneys and property which came to his possession or control as such receiver, and of all moneys paid out by him, together with his vouchers therefor.

R.... C....

[*Jurat.*]

471. Notice of application for receiver (Iowa Code sec. 3822).

[*Title of court and of cause.*]

TAKE NOTICE that upon the verified petition in this action on file, and upon the affidavits of W.... X.... and Y.... Z...., copies of which are served herewith, the plaintiff will on the day of, 19.., at the hour of o'clock A. M., at, Iowa, make application to the Honorable R.... S.... judge of the district court [*or to the district court*] for the judicial district of Iowa, for the appointment of a receiver in the above entitled action.

Dated, 19..

A.... B...., Plaintiff.

To C.... D...., Defendant,

By L.... M....,

and to N.... O...., his attorney.

His Attorney.

472. Order appointing receiver (Iowa Code sec. 3822).

[*Title of court and of cause.*]

Upon reading the verified petition in this action and the affidavits of W.... X.... and Y.... Z...., filed herein, and on

motion of L.... M...., plaintiff's attorney, after hearing N.... O...., counsel for defendant;

IT IS ORDERED that R.... C...., of be and he hereby is appointed receiver of [*here specify property*].

That the said R.... C...., before entering upon the discharge of his duties, file a bond with the clerk, with sureties to be approved by him, in the penalty of dollars, and take the oath prescribed by law.

Further ordered that upon the filing of such bond, and taking of such oath, such receiver shall be vested with the usual rights and powers of receivers under this court [*specify any peculiar powers bestowed, or directions given*].

Dated, 19..

R.... S...., Judge.

473. Bond of receiver (Iowa Code sec. 3823).

KNOW ALL MEN by these presents that we, R.... C...., principal, and G.... H.... and J.... K...., sureties, are held and firmly bound unto C.... D...., in the penal sum of dollars, lawful money of the United States, well and truly to be paid to them, and each of them, and their heirs, executors, administrators and assigns.

THE CONDITION of this obligation is such that, whereas the said R.... S.... was on the day of, 19.., appointed by the district court of the state of Iowa, in and for county [*or by the judge of said court*] a receiver in an action pending in said court, wherein A.... B.... is plaintiff and C.... D.... is defendant; now, if the said R.... C.... shall and will, well and faithfully discharge his duties as such receiver, and obey the orders of the court in respect thereto, then this obligation to be void; otherwise to remain in full force and virtue.

Dated at, 19..

R.... C....

G.... H....

J.... K....

[*Add justification, and the following approval*]:

The within bond filed and sureties therein approved by me this
.... day of, 19..

P.... Q....

Clerk, District Court.

474. Receiver's oath (Iowa Code sec. 3823).

[*Title of court and of cause.*]

[*Venue.*]

R.... C.... being duly sworn, says that he is the person who was appointed by order of this court, dated, 19.., re-

ceiver in the action of A.... B.... vs. C.... D...., now pending in said court, and that he will faithfully discharge his trust as such receiver to the best of his ability, so help him God.

R.... C....

[*Jurat.*]

475. Plaintiff's undertaking on ex parte application for appointment of receiver (N. Dak. Rev. Codes sec. 5404; S. Dak. Rev. Code C. P. sec. 229).

[*Title of court and of cause.*]

WHEREAS the above name plaintiff has made an *ex parte* application for the appointment of a receiver in this action; and whereas the court upon such application has required of the plaintiff an undertaking in the sum of dollars with sureties, as provided by law;

NOW, THEREFORE, we, A.... B...., as principal, and G.... H...., farmer, of, and J.... K...., merchant, of, in said county of do hereby undertake, pursuant to the statute, in the sum of dollars, that the said A.... B.... will pay to C.... D.... the defendant, all damages he may sustain by reason of the appointment of such receiver and the entry by said receiver on his duties in case the said A.... B.... shall have procured such appointment wrongfully, maliciously, or without sufficient cause.

Dated, 19..

A.... B....

G.... H....

J.... K....

In presence of:

[*Two witnesses.*]

[*Acknowledgment and justification of sureties.*]

The above undertaking approved as to form and sufficiency of sureties.

R.... S....

Judge.

476. Receiver's oath (N. Dak. Codes sec. 5405; S. Dak. Rev. Code C. P. sec. 230).

[*Title of court and of cause.*]

[*Venue.*]

R.... C.... being duly sworn, says that he will perform the duties of receiver in the above entitled action faithfully and to the best of his ability, so help him God.

R.... C....

[*Jurat.*]

477. Receiver's undertaking (N. Dak. Rev. Codes sec. 5405; S. Dak. Rev. Code C. P. sec. 230).

[*Title of court and of cause.*]

WHEREAS by order of said court, dated on the day of, 19.., in the above entitled action R.... C...., of, was duly appointed receiver of [*here state the property*];

NOW, THEREFORE, we R.... C...., as principal, and G.... H...., farmer, of, and J.... K...., merchant, of, as sureties, do hereby undertake and agree to and with the said C.... D.... [*or such other person as the court or judge directs*] in the sum of dollars [*sum to be fixed by the court or judge*] that the said R.... C.... will faithfully discharge his duties as receiver in said action, and obey all orders made by the court therein.

Dated, 19..

R.... C....

G.... H....

J.... K....

In presence of:

[*Two witnesses.*]

[*Acknowledgment and justification.*]

[*Approval by court or judge.*]

478. Notice of application for receiver (Cobbey's Ann. Stats. of Nebr. sec. 1249).

[*Title of court and of cause.*]

To C.... D...., defendant above named.

Take notice that upon the petition in the above entitled action, duly verified and filed, and upon the affidavits of W.... X.... and Y.... Z...., copies of which are attached hereto and served herewith, the undersigned will apply to the court of county [*or to the Hon. R.... S...., judge of the court*] at in the city of in said county, on the day of, 19.., or as soon thereafter as counsel can be heard, for an order in said action appointing R.... C.... as receiver of [*here state property*].

You will further take notice that G.... H.... and J.... K.... of are proposed as sureties for the said receiver, and M.... T.... and L.... T.... as sureties for the applicant.

Dated, 19..

A.... B...., Plaintiff,

By L.... M...., His Attorney.

479. Order appointing receiver (Cobbey's Ann. Stats. of Nebr. secs. 1251-1254).

[*Title of court and of cause.*]

The application by the plaintiff for the appointment of a receiver in this action having come on to be heard before the court

[*or* before the undersigned judge, &c.] on the day of, 19.., upon the verified petition of the plaintiff, and the affidavits of W.... X.... and Y.... Z.... [*if upon any other papers name them*] it appearing that due notice of the hearing of said application has been served upon all parties to be affected thereby as required by law, and after hearing L.... M...., Esq., attorney for the plaintiff, and N.... O.... Esq., for the defendant [*or*, no one appearing for the defendant];

ORDERED that R.... C...., Esq., of, be and he is hereby appointed receiver of [*here state the property*];

And further ordered that before said receiver shall enter upon his duties the said plaintiff give a good and sufficient bond, conditioned to pay all damages which the other parties to the suit or any of them may sustain by reason of the appointment of said receiver in case it shall finally be decided that this order ought not to have been granted, and the said R.... C.... shall give a bond conditioned to faithfully discharge his duties as receiver, and obey all orders of the court; each of which bonds shall run to the defendant and all adverse parties in interest, and be in the penal sum of dollars [*double the value of the property in question*] with sureties as provided by law.

Further ordered that the said receiver be and he is hereby empowered and directed to [*here state particularly the powers and duties of the receiver*].

Dated, 19..

R.... S...., Judge.

[*Or*, By the Court:

R.... S...., Judge.

480. Bond of applicant for appointment of receiver (Cobbey's Ann. Stats. of Nebr. sec. 1251).

KNOW ALL MEN by these presents that we, A.... B...., as principal, and G.... H...., farmer, of, and J.... K...., merchant, of, as sureties, are held and firmly bound unto C.... D...., defendant in the action of A.... B.... vs. C.... D...., and unto all adverse parties in interest, in the penal sum of dollars, lawful money of the United States, well and truly to be paid to them and each of them, their heirs, executors, administrators and assigns.

THE CONDITION of this obligation is such that, whereas, upon the application of said A.... B...., plaintiff, in the action of A.... B.... vs. C.... D.... now pending in the district court of county, R.... C...., of, has been appointed receiver of [*here state the property*]; *

Now, therefore, if the said A.... B.... shall pay all damages which the other parties to said suit, or any of them, may sustain by reason of the appointment of said receiver in case it shall finally be decided that the order appointing said receiver ought not to have been granted, then this obligation shall be void; otherwise of force.

Dated, 19..

	A.... B.... [Seal]
In presence of:	G.... H.... [Seal]
[Two witnesses.]	J.... K.... [Seal]
[Justification of sureties.]	
[Approval as follows]:	The within bond and the sureties

therein named are hereby approved.

R..... S....., Judge.

481. Bond of receiver (Cobbey's Ann. Stats. of Nebr. sec. 1251).

[Proceed as in Form 480, inserting, however, the name of the receiver as principal in place of the name of the plaintiff, to the *, then continue as follows]:

Now, therefore, if the said R.... C.... shall faithfully discharge his duties as such receiver and obey all orders of the court, then this obligation shall be void; otherwise of force.

Dated, 19..

	R.... C.... [Seal]
In presence of:	G.... H.... [Seal]
[Two witnesses.]	J.... K.... [Seal]
[Justification and approval as in last preceding form.]	

CHAPTER XVI.

NE EXEAT.

- | | |
|--|--|
| 482. Affidavit for writ of <i>ne exeat</i> (Wisconsin). | 485. Writ of <i>ne exeat</i> . |
| 483. Affidavit of third party in corroboration of plaintiff. | 486. Direction as to amount of bond, to be endorsed on the writ (Wisconsin). |
| 484. Order granting writ (Wisconsin). | 487. Defendant's bond for discharge (Wisconsin). |

The writ of *ne exeat* is very ancient and is purely an equitable remedy and not to be resorted to in an action at law. It is now little used. Doubtless all courts endowed with general equity and common law jurisdiction have power to issue it when a proper case is made, unless the right to the writ has been directly or indirectly abolished. 14 Ency. Pl. & Pr. 320 and notes. In Wisconsin the practice is regulated by statute (Wis. Stats. 1898 secs. 2784-2786) but the remedy is still only to be used in cases where it was authorized by the common law. The forms following are specially adapted to the Wisconsin practice, but are in substance such as may be used at common law in the absence of statutory regulations.

In case the party against whom the writ is issued does not choose to give the bond required he may move for discharge of the writ on a showing by answer or affidavits that there is no legal reason for its issuance, or he may give bond to the satisfaction of the officer granting the writ to abide and perform the judgment. (Wis. Stats. 1898 sec. 2786; *Griswold v. Hazard*, 141 U. S. 260.)

482. Affidavit for writ of *ne exeat* (Wis. Stats. 1898 sec. 2784).

[*Title of court and of cause.*]

[*Venue.*]

A.... B.... being duly sworn, says that he is the plaintiff in this action and that the same is an action in equity for the dissolution of a copartnership heretofore existing between plaintiff and defendant, and to obtain an accounting and settlement of the copartnership affairs [*or state briefly nature of action*] as more fully appears from the plaintiff's verified complaint in this action, of which a true copy is attached hereto and submitted herewith; that the above named defendant is, as affiant is informed and believes, about to dispose of his property and con-

vert the same into money and depart from this state with the intent of defeating the plaintiff's claim herein.

That [*here state any facts showing such intent within plaintiff's knowledge, such as threats by defendant to depart from the state with his property, or any transfer of property already made.*] And affiant verily believes that unless stayed by the order of this court the defendant will at once depart from this state with his property and thus render ineffectual any judgment which the plaintiff may recover herein.

A.... B....

[*Jurat.*]

483. Affidavit of third party in corroboration of plaintiff.

[*Title of court and of cause.*]

[*Venue.*]

E.... F.... being duly sworn, says that he is a resident of, and of lawful age; that he knows the plaintiff and defendant in the above entitled action; that he is in no wise interested in said action; that he heard the defendant say on or about, 19.., that he was about to move out of the state, and to the state of, as quick as he could sell out and dispose of his property; and that the plaintiff could never collect any judgment out of him [*or state facts within knowledge of the affiant showing the defendant's intention to defeat the plaintiff's action by disposal of property and removal from the state.*]

E.... F....

[*Jurat.*]

484. Order granting writ (Wis. Stats. 1898 sec. 2785).

[*Title of court and of cause.*]

Upon the verified complaint herein, and the affidavits of the plaintiff and E.... F...., by which it satisfactorily appears that this is an action in which a writ of *ne exeat* may properly be issued, and that sufficient grounds exist therefor;

On motion of G.... H...., plaintiff's attorney;

IT IS ORDERED that such writ be granted and issue out of said court, and that there be endorsed thereon a direction that the penalty of the bond to be given by the defendant be the sum of dollars, with at least two sureties, who shall make and file with such bond an affidavit in which each shall make oath that he is worth the sum of dollars in property within this state, over and above his debts and liabilities, and exclusive of all property exempt from execution.

Dated at this day of, 19..

I.... K....,
Circuit Judge.

485. Writ of ne exeat.

THE STATE OF WISCONSIN to the Sheriff of County.

Greeting: Whereas it satisfactorily appears that an action has been commenced and is now pending in the circuit court for said county by A.... B...., plaintiff, against C.... D...., defendant, for dissolution of a partnership heretofore existing between said parties, and an accounting [*or otherwise briefly state the nature of the action*] and that said action is one in which a writ of *ne exeat* may properly be issued;

And, whereas it further appears that said defendant intends soon to depart from this state and to take therefrom and beyond the jurisdiction of the court, aforesaid, all his money, effects and property, so as to render ineffectual any judgment that the said plaintiff may recover against him, and with such purpose;

NOW, THEREFORE, you are hereby commanded, without delay to cause the said C.... D.... to come personally before you and give a sufficient bond, in the sum of dollars, that he will not go, nor attempt to go, into parts without this state, without leave of our said court; and in case he shall refuse to give such bond, then you are commanded to commit the said C.... D...., defendant, to the common jail of your said county, there to be kept in safe custody until he shall give such bond. And when you have taken such bond, you are forthwith to return this writ with your doings therein, and the said bond, to the court.

[SEAL OF COURT] WITNESS the Hon. I....K....,
judge of said court, at the court house
in the city of in said county,
this day of, 19..
O.... P...., Clerk.

486. Direction as to amount of bond, to be endorsed on the writ (Wis. Stats. 1898 sec. 2785).

To R.... S...., Sheriff of County.

Pursuant to order granting this writ, require C.... D...., defendant, to give security in the sum of dollars, by bond in such penal sum, with two sureties, who shall each make affidavit to the effect that he is worth in the aggregate the sum of dollars over and above debts and liabilities, in property within this state, and exclusive of all property exempt from execution.

O.... P...., Plaintiff's Attorney,
....., Wis.

487. Defendant's bond for discharge (Wis. Stats. 1898 secs. 2785, 2786).

[*Title of court and of cause.*]

KNOW ALL MEN that we, C.... D...., principal, and L.... M.... and N.... O...., sureties, all of county, Wisconsin, are held and firmly bound unto R.... S...., the sheriff of county, in the penal sum of dollars, lawful money of the United States, for the payment of which sum well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

WHEREAS the above bounden C.... D.... by virtue of a writ of *ne exeat* issued out of the circuit court in and for the county of in the state of Wisconsin, in an action now pending in said court, wherein A.... B.... is plaintiff, and the said C.... D.... is defendant, is now in custody of the sheriff, and required to give security as said writ directs.

NOW, THE CONDITION hereof is such that if the said C.... D.... shall not go, nor attempt to go out of this state, without leave of said court, or until said writ be duly discharged, then this obligation to be void; otherwise of force.

Signed, sealed and delivered	C.... D.... [Seal]
in the presence of:	L.... M.... [Seal]
	N.... O.... [Seal]
W.... X....	
Y.... Z....	

[*Add justification and approval of bond by officer granting the writ.*]

PART II.

FORMS OF COMPLAINTS.

CHAPTER XVII.

FORMAL PARTS OF COMPLAINTS OR PETITIONS.

- | | |
|---|---|
| 488. Common form of complaint (or petition). | 492. Where judgment has been had against a defendant. |
| 489. The same, stating several causes of action. | 493. Statement of reason for making party defendant instead of plaintiff. |
| 490. Stating part of second cause of action, by reference. | 494. Amended complaint. |
| 491. Against one defendant severally liable, others not served. | 495. Supplemental complaint. |

488. Common form of complaint (or petition).

STATE OF

In Court for County

[Names of all the plaintiffs],
Plaintiffs.

VS.

[Names of all the defendants],
Defendants.

[In Iowa add:

..... term 19..

Petition at Law, *or*,
Petition in Equity].

The plaintiff complains of defendant and alleges:

I. [Here state concisely the facts constituting the cause of action, stating each fact separately, in numbered paragraphs, and mark each folio.]

WHEREFORE the plaintiff [or plaintiffs] demands judgment against the defendant [or defendants] for the sum of dollars and cents, together with interest thereon from the day of, 19.., [or *when the action is for the recovery of sums which became payable at different times, say: with interest on dollars thereof, from the day of 19.., and with interest on dollars thereof, from the day of, 19..,*] together with the costs of this action.

[Signature and address of plaintiff, if appearing in person or signature and office and post

[Verification.] office address of plaintiff's attorney.]

489. The same, stating several causes of action.

[Title of court and of cause.]

The plaintiff complains of the defendant and alleges:

First: For a first cause of action,

I. That, *etc., etc., etc.*

Second: And for a second cause of action,

I. That, *etc., etc., etc.*

490. Stating part of second cause of action, by reference.

Second: For a second cause of action,

I. The plaintiff repeats and realleges as a part of this cause of action, all the allegations contained in paragraphs , and of the first cause of action.

491. Against one defendant severally liable, others not served.

The plaintiff, suggesting to the court that the summons in this action has not been served upon the defendant W. . . . X. . . . named therein, complains against the defendant Y. . . . Z. . . . and alleges:

492. Where judgment has been had against a defendant.

The plaintiff, suggesting to the court that the summons in this action has been served on the defendant, W. . . . X. . . . , but that he has not appeared, and that by reason thereof judgment has been taken against him, in respect of the premises, thereupon complains against the defendant Y. . . . Z. . . . , and alleges:

493. Statement of reason for making party defendant instead of plaintiff.

That the defendant Y. . . . Z. . . . is jointly interested with plaintiff [*state in what way, e. g., as co-trustee with the plaintiff*] in the aforesaid cause of action; that before bringing this action plaintiff requested said defendant to join as a co-plaintiff herein, but he refused so to do, and therefore is made a defendant.

494. Amended complaint.

[*Title of court and of cause.*]

The plaintiff by this, his amended complaint [*or petition*], alleges:

[*Set forth cause of action as in an original pleading.*]

495. Supplemental complaint.

[*Title of court and of cause.*]

The plaintiff, for his supplemental complaint herein served under and pursuant to an order of this court duly made, dated on the day of , 19. . . , to which reference is hereby made, alleges:

[*Set forth new and additional facts.*]

CHAPTER XVIII.

VERIFICATIONS.

- | | |
|--|--|
| 496. Verification on knowledge, common form by sole party (Wisconsin). | 508. Verification by one of several parties united in interest (Minnesota). |
| 497. The same, partially on information and belief (Wisconsin). | 509. Verification by officer of corporation (Minnesota). |
| 498. Verification by attorney in action on written instrument in his possession (Wisconsin). | 510. Verification by party (Iowa). |
| 499. The same, by attorney personally knowing the facts (Wisconsin). | 511. Verification by agent or attorney, in action on instrument in writing (Iowa). |
| 500. Verification by agent (Wisconsin). | 512. Verification by agent or attorney (Iowa). |
| 501. Verification by one of several parties united in interest (Wisconsin). | 513. Verification by person knowing the facts (Iowa). |
| 502. Verification by two parties pleading together (Wisconsin). | 514. Verification by officer or agent of corporation (Iowa). |
| 503. Verification by officer of a corporation (Wisconsin). | 515. Verification by one of several parties united in interest (Iowa). |
| 504. Verification by foreign corporation (Wisconsin). | 516. Verification by party (Nebraska). |
| 505. Verification when the state, or a public officer is a party (Wisconsin). | 517. Verification by agent or attorney (Nebraska). |
| 506. Verification by party (Minnesota). | 518. Verification by party (North and South Dakota). |
| 507. The same, by attorney (Minnesota). | 519. Verification by one of several parties united in interest (North and South Dakota). |
| | 520. Verification by officer of corporation (North and South Dakota). |
| | 521. Verification by agent or attorney (North and South Dakota). |

496. Verification on knowledge, common form by sole party (Wis. Stats. 1898 sec. 2666 as amended by Laws 1905 c. 150).

[Venue.]

A.... B.... being first duly sworn, says that he is the plaintiff [or defendant] in the above entitled action; that he has read

the foregoing complaint [*or answer, or reply*] and knows the contents thereof, and that the same is true to his own knowledge.

A.... B....

Subscribed and sworn to before
me this day of
19..

C.... D....,
Notary Public, Wis.

497. The same, partially on information and belief (Wisconsin).

[*Venue.*]

A.... B.... being first duly sworn, says that he is the plaintiff [*or defendant*] in the above entitled action; that he has read the foregoing complaint [*or answer, or reply*] and knows the contents thereof, and that the same is true to his own knowledge, except as to those matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

A.... B....

[*Jurat.*]

498. Verification by attorney in action on written instrument in his possession (Wisconsin).

[*Venue.*]

A.... B.... being duly sworn, says that he is the attorney for the plaintiff [*or defendant*] in the above entitled action; that he knows the contents of the foregoing complaint [*or answer*] and that the same is true to his own knowledge, except as to those matters therein stated on information and belief, and as to those matters he believes it to be true. Deponent further says that the reason why this verification is not made by the plaintiff [*or defendant*] is that the action [*or defense*] is founded upon a written instrument for the payment of money only and such instrument is in the possession of deponent, which said instrument forms the sources of deponent's information and the grounds of his belief [together with admissions made by defendant, *or plaintiff*, to this deponent, *or state other sources of knowledge if any*].

A.... B....

[*Jurat.*]

499. The same, by attorney personally knowing the facts (Wisconsin).

[*Venue.*]

E.... F.... being first duly sworn, says that he is the attorney for the plaintiff in the above entitled action; that he knows

the contents of the foregoing complaint, and that the same is true to his own knowledge.

That the reason this verification is not made by the plaintiff is, that the plaintiff is not now in county, where the affiant resides; and that all the allegations of the said complaint are within the personal knowledge of the affiant.

E.... F....

[*Jurat.*]

500. Verification by agent (Wisconsin).

[*Venue.*]

G.... H.... being first duly sworn, say that he is the agent for the above named plaintiff, and was such agent in relation to the business out of which the cause of action set forth in the above complaint arose; that he has read the foregoing complaint and knows the contents thereof, and that the same is true to his own knowledge; that the reason this verification is not made by the plaintiff is that he is not now in the county of, where the plaintiff's attorney resides, and that all the material allegations of the said complaint are within the personal knowledge of affiant.

G.... H....

[*Jurat.*]

501. Verification by one of several parties united in interest (Wisconsin).

[*Venue.*]

A.... B.... being first duly sworn, says that he is one of the plaintiffs [*or* defendants] in the above entitled action; that he has read the foregoing complaint [*or* answer, *or* reply] and knows the contents thereof; that he is acquainted with the facts alleged in said complaint [*or* answer] and that the same is true to his own knowledge except as to those matters therein alleged on information and belief, and as to those matters he believes it to be true; and further affiant says that he is united in interest in this action with his co-plaintiffs [*or* co-defendants].

A.... B....

[*Jurat.*]

502. Verification by two parties pleading together (Wisconsin).

[*Venue.*]

A.... B.... and C.... D...., being each first duly sworn, each for himself says that he is one of the plaintiffs [*or* defendants] in the above entitled action; and that the foregoing com-

plaint [*or answer, or reply*], which he has read and of which he knows the contents, is true to his own knowledge, except as to those matters therein alleged upon information and belief, and as to those matters he believes it to be true.

A.... B....
C.... D....

[*Jurat.*]

503. Verification by officer of a corporation (Wisconsin).

[*Venue.*]

A.... B.... being first duly sworn, says that he is the president [*or other officer*] of the A.... B.... Company, the plaintiff [*or defendant*] in the above entitled action, and that the foregoing complaint [*or answer, or reply*] is true to his own knowledge [except as to those matters therein alleged on information and belief, and as to those matters he believes it to be true].

He further says that the reason why this verification is not made by the plaintiff [*or defendant*] is that the plaintiff [*or defendant*] is such corporation, and that deponent is such officer and is acquainted with the facts. [*If any allegations are made on information and belief, continue thus*]: and that the grounds of his belief as to all matters stated herein to be on information and belief are as follows [*here state the facts and sources of information, e. g., information obtained from inspection of the books and records of the plaintiff corporation, or information obtained by affiant from personal investigation of the facts and from statements made to affiant by officers and agents of said corporation in the regular course of their duties*].

A.... B....

[*Jurat.*]

504. Verification by foreign corporation (Wisconsin).

[*Venue.*]

A.... B.... being duly sworn, says he is the agent [*or attorney*] for the L.... M.... Company, the corporation plaintiff [*or defendant*] above named, which is a foreign corporation created and existing under the laws of the state of [*or under the laws of the United States*] and makes this affidavit in its behalf, and that the foregoing complaint [*or other pleading*] is true to the knowledge of deponent [except as to those matters therein stated on information and belief, and as to those matters he believes it to be true].

That the reason why this verification is not made by the party is that said party is a foreign corporation, and that deponent

is such officer and is acquainted with the facts. [*If any allegations are made on information and belief, continue thus: and that the sources of deponent's information and the grounds of his belief are, etc., as in Form 503.*]

A.... B....

[*Jurat.*]

505. Verification when the state, or a public officer, is a party (Wisconsin).

[*Venue.*]

A.... B.... being duly sworn says [*state residence and business*] and that he is acquainted with the facts stated in the foregoing complaint [*or other pleading*] and that said complaint [*or other pleading*] is true to his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

A.... B....

[*Jurat.*]

506. Verification by party (Minn. Rev. Laws 1905 sec. 4142).

[*Venue.*]

A.... B.... being duly sworn, says that he is the plaintiff [*or one of the plaintiffs, or defendant, or one of the defendants*] in the above entitled action; that he has read the foregoing complaint [*or answer, or reply*] and knows the contents thereof; that the same is true to his own knowledge, except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

A.... B....

[*Jurat.*]

507. The same, by attorney (Minnesota).

[*Venue.*]

E.... F.... being duly sworn, says that he is the attorney [*or agent*] for the plaintiff [*or defendant*] in the above entitled action; that he has read the foregoing complaint [*or answer, or reply*] and knows the contents thereof; that the same is true to the best of his knowledge, information and belief; that the reason why this verification is not made by the plaintiff is that he is absent from the county of wherein the plaintiff's [*or defendant's*] attorney resides.

E.... F....

[*Jurat.*]

508. Verification by one of several parties united in interest (Minnesota).[*Venue.*]

A.... B.... being duly sworn, says that he is one of the plaintiffs [*or one of the defendants*] in the above entitled action, and is united in interest with his co-plaintiffs [*or with his co-defendants*]; that he has read the foregoing complaint [*or answer, or reply*] and knows the contents thereof, and is acquainted with the facts therein alleged, and that the same is true to his own knowledge, except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

A.... B....

[*Jurat.*]**509. Verification by officer of corporation (Minnesota).**[*Venue.*]

A.... B.... being duly sworn, says that he is the president [*or other officer*] of the A.... B.... Company, plaintiff [*or defendant*] in the above entitled action; that he has read the foregoing complaint [*or answer, or reply*] and knows the contents thereof; that the same is true to his own knowledge, except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

A.... B....

[*Jurat.*]**510. Verification by party (Iowa Code secs. 3580 et seq.).**[*Venue.*]

A.... B.... being duly sworn, says that he is the plaintiff [*or defendant*] in the above entitled action; that the statements and allegations of the foregoing petition [*or answer, or reply*] have been read to him [*or by him*] and the same are true as he believes [and that the bill of particulars attached to said petition is just and true as he believes].

A.... B....

[*Jurat.*]**511. Verification by agent or attorney, in action on instrument in writing (Iowa).**[*Venue.*]

A.... B.... being duly sworn, says that he is the attorney [*or agent*] of the plaintiff in the foregoing petition [*or answer*]; that the promissory note [*or other instrument as the case may be*] set out in said petition [*or answer*] [*or annexed thereto*] is

in his possession as such attorney [*or agent*] and that the statements of said petition [*or answer*] are true as he believes. [*If the petition be an attachment action, add: And affiant further says that the facts alleged in said petition as grounds for the issuance of an attachment are known to him, and that said allegations are true.*]

A.... B....

[*Jurat.*]

512. Verification by agent or attorney (Iowa).

[*Venue.*]

A.... B.... being duly sworn, says that he is the agent [*or attorney*] of the plaintiff [*or defendant*] in the foregoing petition [*or answer*] and knows its contents, and the statements and allegations therein contained are true as he believes; that affiant's knowledge of the truth of the facts therein stated is derived from the fact [*here set forth facts showing competency, as*]: that affiant had entire charge of the transactions set forth in said petition [*or answer*] as agent for the plaintiff [*or defendant*] and has personal knowledge of the facts, and that the plaintiff [*or defendant*] is a non-resident of the state and was not present when said transactions occurred; that affiant has better knowledge of the facts stated in said petition [*or answer*] than has the plaintiff [*or defendant*] himself.

A.... B....

[*Jurat.*]

513. Verification by person knowing the facts (Iowa Code sec. 3584).

[*Venue.*]

A.... B.... being duly sworn, says that he has read the foregoing petition [*or answer*]; that he knows the facts therein alleged of his own personal knowledge, and that the statements of said petition [*or answer*] are true as he believes [*here set out the reason why the pleading is not verified by the party, and show competency of the one verifying*].

A.... B....

[*Jurat.*]

514. Verification by officer or agent of corporation (Iowa Code sec. 3581).

[*Venue.*]

A.... B.... being duly sworn says that he is the president [*or other officer*] [*or the duly authorized agent*] of the A.... B.... Company, the plaintiff [*or defendant*] in the above en-

titled action, and has read the foregoing petition [*or answer*] and knows the contents thereof, and that the statements therein contained are true as he believes [*here state facts showing competency*].

A.... B....

[*Jurat.*]

515. Verification by one of several parties united in interest (Iowa Code sec. 3582).

[*Venue.*]

A.... B.... being duly sworn, says he is one of the plaintiffs [*or defendants*] in the above entitled action, and is united in interest with his co-plaintiffs [*or co-defendants*] and makes this affidavit on behalf of himself and his co-plaintiffs [*or co-defendants*]; that he has read the foregoing petition [*or answer*] and knows the contents thereof, and that the statements therein contained are true as he believes.

A.... B....

[*Jurat.*]

516. Verification by party (Cobbey's Ann. Stats. of Nebr. secs. 1115 et seq.).

[*Venue.*]

A.... B.... being duly sworn, says he is the plaintiff [*or defendant*] in the above entitled action, and has read the foregoing petition [*or answer, or reply*] and knows the contents thereof, and that he believes the facts stated therein to be true [*if pleading is to be used as an affidavit, substitute: that the facts stated in said petition, or answer, or reply, are true*].

A.... B....

Subscribed in my presence and
sworn to before me this day
of, 19..

E.... F....,

Notary Public.

517. Verification by agent or attorney (Nebraska).

[*Venue.*]

A.... B.... being duly sworn, says he is the agent [*or attorney*] of C.... D.... the plaintiff [*or defendant*] in the above entitled action, and that he has read the foregoing petition [*or answer, or reply*] and knows the contents thereof, and that the facts therein stated are true as he believes; that the reason why this affidavit is not made by the plaintiff [*or defendant*] himself is because the facts are within the personal knowledge of affiant

as such agent [*or* attorney]. [*Or*: that the plaintiff is an infant, *or* of unsound mind, *or* imprisoned; *or*: that the petition, *or* answer is founded upon a written instrument for the payment of money only, and such instrument is in my possession; *or*: that the plaintiff, *or* defendant, is absent from county, or is not a resident thereof; *or*: that the plaintiff, *or* defendant, is a corporation, and that affiant is the president, *or* other officer *or* agent, of said corporation, upon whom a summons could be legally served].

A.... B....

[*Jurat.*]

518. Verification by party (N. Dak. Rev. Codes sec. 5281; S. Dak. Rev. Code C. P. sec. 134).

[*Venue.*]

A.... B.... being duly sworn, says he is the plaintiff [*or* defendant] in the above entitled action; that he has read the foregoing complaint [*or* answer, *or* reply] and knows the contents thereof, and that the same is true to his own knowledge, except as to those matters therein stated upon information and belief, and as to those matters he believes it to be true.

A.... B....

[*Jurat.*]

519. Verification by one of several parties united in interest (North Dakota and South Dakota).

[*Venue.*]

A.... B.... being duly sworn, says he is one of the plaintiffs [*or* defendants] in the above entitled action, and is united in interest with his co-plaintiffs [*or*, co-defendants] and makes this affidavit on behalf of himself and his said co-plaintiffs [*or*, co-defendants]; that he has read the foregoing complaint [*or* answer, *or* reply] and knows the contents thereof, and is acquainted with the facts therein stated, and that the same is true to the knowledge of affiant, except as to those matters therein stated upon information and belief, and as to those matters he believes it to be true.

A.... B....

[*Jurat.*]

520. Verification by officer of corporation (North Dakota and South Dakota).

[*Venue.*]

A.... B.... being duly sworn, says he is the president [*or* other officer] of the A.... B.... Company, the corporation

plaintiff [*or* defendant] in the above entitled action, and makes this affidavit on its behalf; that he has read the foregoing complaint [*or* answer, *or* reply] and knows the contents thereof, and that the same is true to the knowledge of affiant, except as to those matters therein stated upon information and belief, and as to those matters he believes it to be true.

A.... B....

[*Jurat.*]

521. Verification by agent or attorney (North Dakota and South Dakota).

[*Venue.*]

A.... B.... being duly sworn, says he is the agent [*or* attorney] of the above named plaintiff [*or* defendant] and makes this affidavit on his behalf; that he has read the foregoing complaint [*or other pleading*] and knows the contents thereof, and that the same is true to the best knowledge, information and belief of affiant; that the reason why this verification is not made by the plaintiff [*or* defendant] himself is that said party is absent from county, in which his attorney resides [*or*, that said party is not a resident of county, in which his attorney resides].

A.... B....

[*Jurat.*]

CHAPTER XIX.

COMPLAINTS AND PETITIONS: ALLEGATIONS OF REPRESENTATIVE CAPACITY.

- | | |
|--|---|
| <p>522. Plaintiff suing on behalf of himself and many others.</p> <p>523. The same, by one creditor on behalf of all.</p> <p>524. The same, by taxpayer suing to prevent illegal expenditure of public moneys (Wisconsin).</p> <p>525. The same, by one stockholder of an unincorporated joint stock association.</p> <p>526. One defendant sued as representative of others.</p> <p>527. Action by assignee of claim.</p> <p>528. The same, alleging defendant's consent to assignment.</p> <p>529. The same, alleging assignment in writing.</p> <p>530. Allegation of assignment, in action brought in United States court, on ground of different citizenship.</p> <p>531. Equitable assignment of part of fund to become due.</p> <p>532. By assignee for the benefit of creditors.</p> <p>533. By substituted assignee for benefit of creditors.</p> <p>534. By assignee under state insolvent law.</p> <p>535. By foreign official assignee.</p> <p>536. By a devisee.</p> <p>537. By heir at law.</p> <p>538. By officer of unincorporated association (New York).</p> <p>539. By or against domestic corporation.</p> <p>540. By or against a foreign corporation.</p> <p>541. By or against a municipal corporation.</p> <p>542. Complaint by administrator.</p> | <p>543. Complaint against administrator.</p> <p>544. Complaint by executor.</p> <p>545. Against administrator with will annexed.</p> <p>546. Complaint by administrator <i>de bonis non</i>.</p> <p>547. Allegation when executor refuses to join in an action.</p> <p>548. Against executor <i>de son tort</i>.</p> <p>549. Complaint by foreign administrator.</p> <p>550. Husband and wife suing together.</p> <p>551. Against husband and wife, on wife's debt.</p> <p>552. The same, husband having acquired wife's separate property.</p> <p>553. The same, wife's property acquired after marriage.</p> <p>554. Complaint of infant plaintiff, suing by guardian <i>ad litem</i>.</p> <p>555. Allegations of diverse citizenship in actions in the United States courts.</p> <p>556. The same, in action in equity.</p> <p>557. The same, by alien against citizen, on action at law.</p> <p>558. Action by committee of lunatic, idiot, &c.</p> <p>559. Action against committee of a lunatic.</p> <p>560. Action by general guardian of insane or incompetent person (Wisconsin).</p> <p>561. By married woman, relating to her separate estate.</p> <p>562. The same, in action upon other than money contract.</p> <p>563. Action by or against partners, common form.</p> <p>564. By surviving partner.</p> |
|--|---|

565. By or against public officer.
 566. By the state, upon information of the attorney general (Wisconsin).
 567. The state, by its attorney general on relation of a private person (Wisconsin).
 568. By receiver, in supplementary proceedings.

569. By receiver appointed in an action.
 570. By receiver of corporation in sequestration action.
 571. Action by stockholder in the interest of the corporation, directors refusing to sue.

522. Plaintiff suing on behalf of himself and many others.¹

[Title of court.]

A. B., on behalf
 of himself and all others
 similarly situated,
 Plaintiff,

vs.

Y. Z.,
 Defendant.

The plaintiff, on behalf of himself and all others similarly situated who shall come in and contribute to the expense of this action, complains of the defendant and alleges:

[The allegations must show that the question is one of common and general interest to many persons, or that others similarly situated are very numerous and that it is impracticable to join them all, e. g.]:

I. That the question which is the subject of this action is one of common and general interest to all [the stockholders of the said defendant corporation].

II. That, as plaintiff is informed and believes, the holders and owners of stock are very numerous and exceed . . .² in number, and many of them are not residents of this state, and the names of some of them are unknown to the plaintiff and cannot with due diligence be ascertained by him; and it is, therefore, impracticable to bring them all before the court.

III. [Set forth cause of action.]

¹ Wis. Stats. 1898 sec. 2604; Iowa Code sec. 3464; Minn. Rev. Laws 1905 sec. 4053; N. Dak. Rev. Codes sec. 5232; S. Dak. Rev. Code C. P. sec. 89; Cobbeys Ann. Stats. of Nebr. sec. 1039.

² It is held in Wisconsin that thirty-one persons are not too numerous to join (*George v. Benja-*

min, 100 Wis. 622), but that seventy-five is a sufficient number to justify one or more to sue for all (*Hodges v. Nalty*, 104 Wis. 464). The general equity rule independent of statute is that actions may be brought by one or more on behalf of others, in three classes of cases, viz: (1) Where the ques-

523. The same, by one creditor on behalf of all.[*Title of court and of cause as in Form 522.*]

The plaintiff, complaining on behalf of himself and all others, the creditors of M.... N.... who shall in due time come in and seek relief by, and contribute to the expenses of this action, alleges:

[*Set forth cause of action.*]

That the said creditors of M.... N.... are very numerous, to-wit, more than in number, and that some of them are unknown to the plaintiff, and cannot with diligence be ascertained by him, and that it is impracticable therefore for him to bring them all before the court in this action; wherefore he sues for the benefit of himself and all of said creditors.

524. The same, by taxpayer suing to prevent illegal expenditure of public moneys (Webster v. Douglas Co., et al., 102 Wis. 181).[*Title of court.*]

A..... B....., on behalf of
himself and all other taxpayers
of the county of

Plaintiff,

vs.

The County of, and
C..... D....., County
Treasurer of said County,

Defendants. }

The plaintiff, on behalf of himself and all other taxpayers of the county of, complains of the defendants, and alleges:

I. That he is and was at the times hereinafter stated, a resident taxpayer of the said county of

II. [*Here set forth the cause of action.*]

III. That upon demand duly made by this plaintiff on the day of, 19.., the said county, by its officers refused to bring this action, wherefore this plaintiff on behalf of himself and all other taxpayers of said county prosecutes this action.

[*Prayer for judgment.*]

tion is of a common or general interest, and one or more sue or defend for the benefit of the whole; (2) where the parties constitute a voluntary association for public or private purposes, and those who sue or defend may fairly be presumed to represent the rights and

interests of the whole; and (3) where the parties are very numerous, and though they have or may have separate and distinct interests, yet it is impracticable to bring them all before the court. Story's Eq. Pl. sec. 97.

525. The same, by one stockholder of an unincorporated joint stock association (Platt v. Calvin (Ohio), 36 N. E. 735).

[*Title of court.*]

A.... B...., President and
Stockholder of the L....
M.... Association,
Plaintiff,

vs.

Y.... Z....,
Defendant.

The plaintiff complains of the defendant, and alleges:

I. That the L.... M.... Association is a joint stock association, duly organized in the year 19.. under the laws of the state of and ever since existing and doing business as such, and consists of about shareholders, owning shares, all of which persons have a joint ownership and interest in the cause of action hereinafter set forth, but are too numerous to be joined as parties plaintiff; and that the said A.... B.... is president of the said L.... M.... Association, and a stockholder therein; and as such brings this suit in behalf of said association, and all the stockholders thereof.

526. One defendant sued as representative of others.

[*Title of court.*]

A.... B....,
Plaintiff,

vs.

C.... D...., individually and as
representative of all holders of
the trust certificates hereinafter
named. [*Or otherwise describe
class, according to the fact.*]

The plaintiff complains of the defendant, and alleges:

I. That the [*name the class, as: holders of said trust certificates*] are more than in number, and a part of them are non-residents of this state [*or unknown to the plaintiff*] and that it is impracticable to bring them all before the court, wherefore the said C.... D.... is made defendant herein as representative of all of said [*name the class*].

527. Action by assignee of a claim.

[*Title of court and of cause.*]

The plaintiff complains of the defendant, and alleges:

I. [*State cause of action accruing to the assignor.*]

II. That on the day of, 19.., [*or, thereafter and before this action*] the said A.... B.... duly assigned the said claim [*or instrument*] to the plaintiff.

528. The same, alleging defendant's consent to assignment.

[*Title of court and of cause.*]

The plaintiff complains of the defendant, and alleges:

I. [*Set forth the making of the contract.*]*

II. That thereafter said defendant duly gave his consent to said M.... N.... that he might assign said contract by an instrument in writing indorsed thereon [*or signed, sealed, and delivered to him by defendant*] a copy of which consent is annexed to this complaint as a part hereof and marked Exhibit B.

529. The same, alleging assignment in writing.

[*Proceed as in Form 528 to the *.*]

II. That thereafter, and on or about the day of, 19.., and before the commencement of this action said [*assignor*] for a valuable consideration duly assigned said claim [*or name the instrument or cause of action*] to the plaintiff, by an instrument in writing signed, [*sealed*] and delivered by him, a copy of which assignment is annexed to and made a part of this complaint, and marked Exhibit A.

530. Allegation of assignment, in action brought in United States court, on ground of different citizenship.

[*Title of court and of cause.*]

[*If in equity, insert address as in Form 556.*]

I. [*Allege citizenship of parties as in Forms 555, 556, and 557.*]

II. [*State cause of action accruing to assignor.*]

III. [*State assignment to plaintiff as in preceding forms, and continuing*] and that the said [*assignor*] was at the time of the commencement of this action a citizen of the state of

531. Equitable assignment of part of fund to become due.

[*Title of court and of cause.*]

The plaintiff complains of the defendant, and alleges:

I. That on or about the day of, 19.., the defendant Y.... Z...., and one M.... N.... entered into a contract subscribed [*and sealed*] by them, of which the following is a copy: [*Insert copy of contract.*]

II. That on or about the day of, 19.., the said M.... N...., for value received, made and delivered to this plaintiff an order on said defendant, of which the following is a copy: [*Insert copy of order for payment of a sum out of proceeds.*]

III. That said order was thereupon presented to said defendant Y.... Z...., who thereupon and for value received accepted said order, and then and there wrote thereon the following acceptance: [*Insert copy of acceptance.*]

IV. That thereafter, and on or about the day of, 19.., said defendant had in his hands the sum of dollars, proceeds of said contract applicable to payment of said order. [*Or if the order was conditional, as, for instance, on performance of the contract, allege it according to the fact, as thus: That the time for completion of the performance of said contract was extended by written agreement between the parties thereto until the day of, 19.., and thereafter said defendant approved and accepted the work mentioned in said contract, and subscribed and endorsed on said contract the following approval: [Insert copy of endorsement.]*]

V. That thereafter and before the commencement of this action the plaintiff duly demanded of the defendant payment of said order, but he refused payment thereof and there is now due and unpaid thereon the sum of dollars, with interest thereon, etc.

[*Add prayer for judgment.*]

532. By assignee for the benefit of creditors.

[*Title of court.*]

A.... B...., as Assignee for the Benefit of Creditors of C.... D....,	} Plaintiff,
vs.	
E.... F....,	
	Defendant.

The plaintiff complains as assignee for the benefit of creditors of C.... D...., and alleges:

I. [*State facts showing cause of action in C.... D....*]

II. That on or about the day of, 19.., the said C.... D.... duly executed and delivered to this plaintiff an assignment of all the property of said C.... D...., including the cause of action herein set forth, in trust for the benefit of his

creditors. That said assignment was duly acknowledged by the said C.... D...., and was in all respects duly executed and a copy thereof filed as required by law, and the same was duly accepted by the plaintiff, who thereupon gave the bond as required by law and duly qualified as such assignee, and made and filed the inventory as required by law, and ever since has been and is still such assignee. *[It is well to set forth fully compliance with all statutory requirements, especially in suits against creditors, in order to show a valid assignment.]*

533. By substituted assignee for benefit of creditors.

[Allege appointment and qualification of original assignee, as in Form 532.]

That thereafter, in proceedings duly had before Hon. I.... K...., judge of the court for county, an order was duly made by said judge, removing [*or accepting the resignation of and discharging*] said A.... B.... and appointing this plaintiff in his stead, and this plaintiff thereupon and before this action duly qualified as the assignee of the property of said C.... D.... in trust for the benefit of creditors, and entered upon his duties as such [*and filed the inventory and bond required by law*].

534. By assignee under state insolvent law.

[Title of court.]

A.... B...., as Assignee of C.... D...., an In- solvent Debtor,	}	Plaintiff,
vs.		
E.... F....,		Defendant.

The plaintiff complains as assignee of C.... D...., an insolvent debtor, and alleges:

I. [*Here set forth the facts showing a cause of action in C.... D....*]

II. That thereafter, in proceedings had before the Hon. I.... K...., judge of the court, pursuant to [*state the title of the law or chapter governing insolvency proceedings*] an order was duly made by said judge [*here state the facts fully showing the terms of the order, the making of the assignment thereunder to the plaintiff, and the plaintiff's qualification as assignee*].

[If action is in United States court, on ground of different citizenship, set forth citizenship of assignor as well as that of parties.]

535. By foreign official assignee.

[*Title of court and of cause as in preceding forms.*]

The plaintiff complains as assignee for the benefit of creditors of C.... D...., and alleges:

I. That the laws of the state of at the time of the proceedings hereinafter set forth did, and ever since have contained provisions, in [*citing chapter of the statutes*], that [*state material provisions of the statute, either in words or substance, governing and authorizing the plaintiff's appointment.*]

II. That on the day of, 19.. [*here set forth the proceedings showing plaintiff's appointment and qualification in compliance with the statute, as in preceding forms.*]

536. By a devisee.

[*Title of court and of cause.*]

[*Formal commencement of complaint, and allegation of testator's ownership of the land in question.*]

II. That said M.... N.... died, on or about the day of, 19.., leaving a last will and testament, which was thereafter and on the day of, 19.., duly admitted to probate by the court of the county of and wherein and whereby said M.... N.... devised said premises in fee to the plaintiff.

537. By heir at law.

[*After title and allegation of intestate's title and plaintiff's relationship.*]

II. That said M.... N.... died on or about, 19.., intestate, and that the fee of said premises thereupon descended to plaintiff as his sole heir at law.

538. By officer of unincorporated association (N. Y. Code sec. 1919).

[*Title of court.*]

A.... B...., President,
[or Treasurer] of the
X.... Y.... Company,
Plaintiff,

vs.

C.... D....

Defendant.

The plaintiff complaining as president [*or treasurer*] of the X.... Y.... Company, alleges:

I. That said company was at the times hereinafter named and

now is an unincorporated association located in the town of and county of in this state, consisting of seven or more persons.

II. That the plaintiff is the president [*or treasurer*] of said association.

III. [*Set forth cause of action accruing to the association.*]

[*If the action is brought against the president or treasurer of such an unincorporated association the title should be changed, and the foregoing allegations altered in accordance with the fact.*]

539. By or against domestic corporation.

[*Title of court and of cause.*]

The plaintiff complaining of defendant, alleges:

I. That at the times hereinafter mentioned, plaintiff [*or defendant*] was, and now is, a domestic corporation, organized and existing under the laws of this state [*or created under the laws of the United States and located in this state*].

540. By or against a foreign corporation.

[*Title and commencement.*]

I. That the plaintiff [*or defendant*] is a corporation duly chartered under and by the laws of the state of, and pursuant to an act of the legislature of said state, entitled [*title of act*] passed [*date of the enactment*].

II. That said corporation, being entitled, by its charter and the laws of said state, to make the contract hereinafter mentioned [*allege cause of action*].

541. By or against a municipal corporation.

[*Title of court.*]

A.... B....,	}
Plaintiff,	
vs.	
..... County,	
Defendant.	

[*Commencement.*]

I. That the defendant [*or plaintiff*] was at all the times hereinafter mentioned, and now is, a municipal corporation existing under the laws of the state of

II. [*State cause of action.*]

III. [*If by statute any notice must be given to the corporation or its officers before action can be maintained, set forth the*

giving of the notice, as required by the statute, and the failure to pay. Such requirements are conditions precedent.]

542. Complaint by administrator.

[Title of court.]

A.... B...., as administrator
of the estate of C.... D....,
deceased,

Plaintiff,

vs.

E.... F....,

Defendant.

The plaintiff, complaining as administrator of the estate of C.... D...., deceased, alleges:

I. [*Set forth here the facts constituting the cause of action; if it arose before administrator's appointment, then continue*]:

II. That afterwards, and on the day of, 19... said C.... D.... being then an inhabitant of this state, died intestate in the county of being then a resident of said county; and thereafter, on the day of, 19... such proceedings were duly had in the county court of said county of that letters of administration upon the estate of said C.... D.... were duly granted and issued out of said county court to this plaintiff, appointing him sole administrator of the estate of said deceased, which trust he duly accepted, and duly qualified therefor by taking and filing oath and executing bond as required by law, which bond was by said county court duly approved, and plaintiff then entered upon the duties of, and now is, such administrator.

[*The above allegations are proper where the administrator sues as such upon a cause of action accruing to the decedent in his lifetime; if the action is brought upon a cause of action or debt due to the administrator by reason of an act done in the course of administration the action should be in his individual capacity, and the allegation of appointment and qualification should precede the statement of the cause of action.*]

543. Complaint against administrator.

[Title of court and of cause.]

The plaintiff, complaining of defendant as administrator of the estate of C.... D...., deceased, alleges:

I. [*State cause of action against deceased.*]

II. [*Allege appointment of defendant as administrator as in preceding form.*]

III. [*Allege presentation and refusal of claim in those states where such action is necessary before suit.*]

IV. [*If action is on money demand, in Wisconsin, allege failure to fix time for presentation of claims against estate.*]³

544. Complaint by executor.

[*Title of court.*]

A.... B.... as Executor of the last will and testament of C.... D...., deceased,	}	Plaintiff,
vs.		
E.... F....,	}	Defendant.

The plaintiff, complaining as executor aforesaid, alleges:

I. [*State cause of action in decedent.*]

II. That afterwards, and on the day of, 19.., the said C.... D.... died, leaving a last will by which he nominated this plaintiff executor thereof; and on the day of, 19.., said will was, in the county court for county, duly proved and by the judgment of said court was admitted to probate as the last will and testament of said deceased; and letters testamentary were thereupon, on the day of, 19.., duly issued out of said county court to this plaintiff as executor of said will; and that he thereupon duly qualified by taking oath and executing bond, as required by law, which bond was duly approved by said court; and plaintiff entered upon the discharge of the duties of, and is now, such executor.

545. Against administrator with will annexed.

[*Title of court and of cause and commencement as in preceding forms.*]

II. [*Allegations of death of testator, probate of will, appointment and qualification of executor.*]

III. That on or about the day of, 19.., said [executor] departed this life [*or resigned, and his resignation was accepted by said court*]; that thereafter and on or about the day of, 19.., letters of administration with

³ In Wisconsin independent actions on mere money demands are not maintainable against an executor or administrator, but the claim must be presented in the

county court, unless no time for the presentation of claims has been fixed. Wis. Stats. 1898 sec. 3845 as amended by Laws 1899 c. 5.

the will annexed were duly issued and granted by the said court to the defendant, appointing him administrator with the will annexed of the goods, chattels and credits which were of said C. . . . D. . . . , and that said defendant thereupon duly qualified and has ever since been and is now acting as such administrator.

546. Complaint by administrator de bonis non.

[*Title of court, cause, and commencement as in preceding forms.*]

II. [*Set forth death of intestate and granting of prior administration.*]

III. That on or about the day of , 19. . . , said [*administrator*] died without having wholly administered upon the assets of the estate of said [*intestate*]; that thereupon and on or about the day of , 19. . . , letters of administration upon the goods, chattels, and credits of said [*intestate*] left unadministered by said [*administrator*] were duly issued and granted by said court to this plaintiff, who thereafter duly qualified and continues to act as such administrator.

547. Allegation when executor refuses to join in an action.

[*Title and appropriate preliminary allegations as in preceding forms.*]

II. That this plaintiff, prior to the commencement of this action, applied to his co-executor, the said C. . . . D. . . . , named as defendant herein, to join with him in the prosecution of this action, but that said defendant refused and neglected to do so, wherefore the said C. . . . D. . . . is made a defendant in this action.

548. Against executor de son tort.

[*Title of court and of cause.*]

I. [*Allege death of decedent and character of the plaintiff as executor, creditor, &c.*]

II. That after the death of the said [*decedent*] the defendant, without authority of law, took and collected the property of said [*decedent*] within this state, amounting in value to dollars, and converted the same to his own use [*or has ever since retained the same in his own possession*].

549. Complaint by foreign administrator.⁴

[*Title of court and of cause.*]

[*Commencement.*]

I. [*Allege cause of action in decedent.*]

⁴ Wis. Stats. 1898 sec. 3267; Minn. Rev. Laws 1905 sec. 4506. administrator can not maintain an action as such without express legislative authority.

II. That said C.... D.... departed this life at, in the state of, and was, at the time of his death, a resident of said state.

III. That said M.... N.... left a last will and testament, wherein and whereby he appointed plaintiff sole executor thereof; that thereafter, and on or about the day of, 19.., said will was duly admitted to probate by the court of the county of in said state, and letters testamentary were thereupon duly issued and granted by said court to the plaintiff; that said court had jurisdiction and was duly authorized and empowered by the laws of the state of to admit said will to probate and to issue said letters as aforesaid.

IV. That thereafter, and on or about the day of, 19.., the plaintiff filed a duly authenticated copy of his said letters testamentary in the court of county, and that no executor of said will, nor administrator of the estate of said [decedent] has been appointed in this state. [*If other steps are required by local statutes to authorize the maintenance of an action by a foreign executor, compliance therewith should be alleged.*]

550. Husband and wife suing together.

[*Title of court and of cause.*]

[*Commencement.*]

I. That the plaintiffs are husband and wife, and were duly married on or about the day of, 19.., at

551. Against husband and wife, on wife's debt.

[*Title of court and of cause.*]

[*Commencement.*]

I. That the defendant C.... D.... is the wife of the defendant A.... B....

II. That previous to the marriage of the defendants, and while the said C.... D.... was sole and unmarried [*state cause of action against wife*].

III. That previous to the marriage of the defendants, said C.... D.... owned certain property, to-wit, [*here describe the property of the wife which the husband has acquired*].

IV. That before their marriage the defendants entered into an ante-nuptial agreement [*here state effect of agreement as to transfer of property*]; and that the value of the separate property of said defendant C.... D.... so acquired by the defendant A.... B.... was dollars.

552. The same, husband having acquired wife's separate property.

[*As in Form 551 to paragraph IV.*]

IV. That since the marriage of the defendants, and * before this action, the defendant C.... D.... conveyed to the defendant A.... B.... [*here state what was conveyed*]; and that the value of the separate property of the defendant [*wife*], so acquired by the defendant [*husband*] was dollars.

553. The same, wife's property acquired after marriage.

[*Title of court and of cause.*]

[*Commencement.*]

[*Allegations I and II as in Form 551.*]

III. That since the marriage of the defendants, certain property, to-wit [*here describe her separate property*] became the sole and separate property of the defendant [*wife*] by inheritance [*or gift, grant, devise, or, bequest*] from [a person other than her said husband, to-wit, one] M.... N....

IV. That thereafter and [*continue as in Form 552 from the **].

554. Complaint of infant plaintiff, suing by guardian ad litem.⁵

[*Title of court.*]

A.... B...., an Infant, by C.... D...., his guardian ad litem, Plaintiff, vs. E.... F...., Defendant.	}
--	---

The above named plaintiff, complaining of the defendant, alleges:

I. That he is an infant, under the age of twenty-one years, and that on the day of, 19.., on application therefor duly made, C.... D.... was by an order made by O.... P...., Esq., a court commissioner of this court [*or by the court*] duly appointed the guardian of the plaintiff for the purposes of this action, he having consented thereto in writing.

II. [*State cause of action.*]

⁵ In Wisconsin the guardian appointment. Wis. Stats. 1898 sec. must give written consent to his 2618.

555. Allegations of diverse citizenship in actions in the United States courts.[*Title of court and of cause.*][*Commencement.*]

I. That this plaintiff is a citizen of the state of and resides at ; [*or, a corporation duly created and organized by and under the laws of the state of and has its principal office and place of business at in said state*].

II. That the defendant is a citizen of the state of and resides at in said state [*or, is a corporation duly created and organized by and under the laws of the state of and has its principal office and place of business at in said state*].

556. The same, in action in equity.

CIRCUIT COURT OF THE UNITED STATES,

..... District of

A.... B.... ,	}	In Equity.
Plaintiff,		
vs.		
Y.... Z.... ,		
Defendant.		

To the Honorable, the judges of the court of the United States, in and for the district of

A.... B.... , a citizen of the state of and resident of in county [*or, a corporation created and duly organized by and under the laws of the state of and having its principal office and place of business at in the state of*] brings this bill against Y.... Z.... a citizen of the state of [*or, a corporation created and duly organized by and under the laws of the state of and having its principal office and place of business at in county*]. And thereupon your orator complains and says that, &c.

557. The same, by alien against citizen, in action at law.[*Title of court and of cause, and commencement.*]

I. That plaintiff is an alien and a subject of the United Kingdom of Great Britain and Ireland [*or otherwise, according to the fact*] and resides at [*or, that plaintiff is a corporation created and existing by and under the laws of the kingdom, &c., and has its principal office and place of business at*], and that defendant is a citizen of the state of and resides at [*or, is a corporation created and organized by and under the laws of the state of and having its principal office and place of business at*].

558. Action by committee of lunatic, idiot, etc., (N. Y. Code sec. 2340).

[Title of court.]

A.... B...., as committee of
M.... N...., a lunatic [*or*
an idiot, *or* an habitual
drunkard],

Plaintiff,

vs.

W..... X..... and Y.....

Z.....,

Defendants,

The plaintiff, complaining as committee of M.... N...., a lunatic [*or* an idiot, *or* a person of unsound mind, *or* an habitual drunkard], alleges:

I. That on the day of, 19.., upon proceedings duly instituted in the Supreme Court of this state, in and for the county of [*or, in the case of an habitual drunkard, it may be, duly instituted in the county court of the county of*] by an inquisition then taken and returned, [*or, by the verdict of a jury then duly rendered*] said M.... N.... was found to be a lunatic [*or, otherwise, as above*] and thereupon this plaintiff was, by an order of said court, duly made by said court, on the day of, 19.., at appointed a committee of said M.... N....'s person and estate [*or, if of a part of the property, describe the property*]; and that this plaintiff thereupon duly qualified as such committee and entered upon the discharge of the duties of his said office, and is now such committee.

II. [*Set forth cause of action in incompetent.*]

559. Action against committee of a lunatic (New York.)

[Title of court.]

A.... B....,

Plaintiff,

vs.

Y.... Z...., as committee
of M.... N...., a lunatic
[*or, an idiot, or, habitual*
drunkard,

Defendant.

[Commencement and statement of cause of action against the lunatic.]

II. That afterwards [*or, on the day of, 19.., at*

.....] the said Y.... Z...., was duly adjudged by the court to be a lunatic [*or otherwise, as above*].

III. That the defendant was then and there duly appointed by the said court committee of the [person and] estate of the said lunatic, and duly qualified as such committee.

IV. That the plaintiff was duly authorized to commence this action, by an order of the court duly made and entered on the day of, 19..

[*Prayer for judgment*].

560. Action by general guardian of insane or incompetent person (Wis. Stats. 1898 secs. 3976-3982).

[*Title of court*].

A.... B...., as guardian
of the person and estate
of C.... D...., an in-
sane person [*or incom-*
petent],

Plaintiff,

vs.

E.... F....,

Defendant.

The plaintiff, complaining as guardian of the person and estate of C.... D...., an insane person [*or, incompetent, &c.*] alleges:

I. That on the day of, 19.., such proceedings were duly had in the county court of county, upon petition duly filed in that behalf, that it was by said county court duly adjudged and determined that by reason of insanity the said C.... D.... was mentally incompetent and incapable of taking care of himself and managing his property [*or, that the said C.... D.... by excessive drinking was and is unable to attend to business, or state other facts as enumerated in section 3978 Wis. Stats. 1898, authorizing the appointment of a general guardian*], and the said plaintiff was thereupon, by said county court, duly appointed guardian of the person and estate of said C.... D...., with the powers and duties specified by law; and that he accepted and duly qualified by executing bond, which was by said court duly approved, and entered upon the duties of, and is now, such guardian.

II. [*State cause of action*].

561. By married woman, relating to her separate estate.^a[*Title of court*].

A.... B....,	} Plaintiff,
vs.	
C.... D....,	
	Defendant.

The plaintiff, complaining of the defendant, alleges:

I. [*Set forth facts showing cause of action*].

II. That on the day of, 19.., the plaintiff intermarried with one J.... S.... whose wife she now is.

III. That the consideration of the said note [*or* of the said transfer, *or*, indorsement of said note to the plaintiff] was the payment by this plaintiff to the maker [*or* indorser, *or* assignor] thereof, of the sum of dollars, which said sum was [*or*, the principal and interest of a certain sum which was] at and before the time of her marriage, owned by her [*or*, which was acquired by her, by her trade or services]; and thereafter was her sole and separate property, and so continued until the time of such payment; and that said note thereupon became and ever since has been her sole and separate property.

Or: III. That the consideration of the said note, [*or*, of the said transfer, *or*, indorsement, of said note to the plaintiff] was the payment by the plaintiff to the maker [*or* indorser, *or* assignor] of the sum of dollars, which said sum became, [*or* was the principal and interest of a certain sum which became] after her said marriage her sole and separate property by inheritance [*or* gift, grant, devise, *or* bequest] from [a person other than her husband, to-wit, one] M.... N.... and so continued until the time of such payment; and that said note thereupon became and ever since has been her sole and separate property.

Or: III. That the consideration of [*&c. as above*] which said sum was the proceeds of certain property which was at and before [*&c. as above*] [*or* which said sum was the proceeds of certain property which became after [*&c. as above*].

^a This and the following form are no longer necessary in those states which authorize a married woman to sue and be sued in matters relating to her separate business, as if sole; but the complaint should be in the same form as against any

other person. N. Y. Code sec. 450; Wis. Stats. 1898 sec. 2345; Minn. Rev. Laws 1905 sec. 4056; Iowa Code sec. 3162; N. Dak. Rev. Codes sec. 2767; S. Dak. Rev. Code C. C. sec. 105; Cobbe's Ann. Stats. of Nebr. sec. 5319.

562. The same, in action upon other than money contract.[*Title of court and of cause.*][*Commencement.*]I. [*State cause of action.*]II. [*Allege marriage as in preceding form.*]

III. That the property hereinbefore mentioned was, at and before the time of her said marriage, owned by her, and ever since has been her sole and separate property.

Or: That the property hereinbefore mentioned was after her said marriage bought by her with the proceeds of certain property which was at and before the time of her said marriage owned by her; and that ever since the same has been [*&c. as above*].

Or: That the property hereinbefore mentioned became, after her said marriage, her sole and separate property, by inheritance [*or, gift, grant, devise, or, bequest*] from M.... N...., and that ever since the same has been [*&c. as above*].

Or: That the property hereinbefore mentioned was after her said marriage acquired by her, by her trade or services entered into on her own and separate account, and ever since, &c.

563. Action by or against partners, common form.⁷[*Title of court.*]

A.... B.... and C....	}
D....,	
Plaintiffs,	
vs.	
E.... F.... and G....	
H....,	}
Defendants.	

The plaintiffs, complaining of the defendants, allege:

I. That at the times hereinafter mentioned [*or from*, 19.., to, 19..,] the plaintiff [*or defendants*] A.... B.... and C.... D.... were copartners doing business at the city of under the firm name of A.... B.... & Co.

⁷ In Iowa (Iowa Code sec. 3468) and in Nebraska (Cobbey's Ann. Stats. of Nebr. sec. 1023) a partnership may sue or be sued by its firm name, and in Iowa the individual members may be joined. In these cases the title of the action should be in the firm name

and the complaint should allege that the plaintiff or defendant was a partnership doing business under such firm name. In Minnesota a partnership may be sued in its firm name. Minn. Rev. Laws 1905 sec. 4068.

564. By surviving partner.[*Title of court and of cause.*][*Commencement.*]

I. That at the times hereinafter mentioned [*or, on and prior to the day of, 19.., this plaintiff and one C.... D.... were partners doing business under the firm name of A.... B.... & Co., which partnership continued until the death of said C.... D...., as hereinafter alleged.*

II. [*Set forth the cause of action.*]

III. That thereafter and before this action [*or on the day of, 19..*] said C.... D.... died, leaving this plaintiff the sole surviving partner of the firm.

565. By or against public officer.[*Title of court.*]

A.... B...., as [give proper
title of office],

Plaintiff,

vs.

C.... D.... [add title of
office, if against an officer],

Defendant.

The plaintiff, complaining of defendant, alleges:

I. That the plaintiff [*or defendant*] is the [*name proper title of officer*] duly elected [*or appointed*], qualified, and acting as such.

**566. By the state, upon information of the attorney general
(Wis. Stats. 1898 sec. 3466).**[*Title of court.*]

The State of Wisconsin, upon
Information of A.... B....
Attorney General thereof,

Plaintiff,

vs.

C.... D....

Defendant.

The plaintiff, prosecuting this action upon the information of A.... B...., its Attorney General, complaining of the defendant, alleges:

I. &c., &c., &c.

567. The state, by its attorney general on relation of a private person (Wis. Stats. 1898 secs. 3465, 3466).

[*Title of court.*]

The State of Wisconsin, by A.... B...., its Attorney General, upon the Relation of C.... D...., and the said C.... D.... individually,	}	Plaintiffs,
vs.		
E.... F....,		Defendant.

The State of Wisconsin, prosecuting this action by A.... B...., its Attorney General, upon the relation of C.... D...., and the said C.... D.... individually, complaining of the defendant, allege:

I. &c., &c., &c.

568. By receiver, in supplementary proceedings.

[*Title of court and of cause.*]

A.... B...., complaining as receiver of the property of M.... N...., alleges:

I. [*Set forth cause of action accruing to the judgment debtor.*]

II. That on or about the day of, 19.., one O.... P.... recovered judgment against said C.... D.... in the court, for the sum of dollars; that the judgment was on the day of, 19.., duly filed and docketed in the office of the clerk of the court for the county of where said judgment debtor then resided and still resides; that an execution against the property of said judgment debtor was thereupon issued to the sheriff of said county, which execution has been returned by said sheriff wholly unsatisfied, and that said judgment is now wholly unpaid.

III. That on the day of, 19.., at, upon an application made by said judgment creditor of said M.... N...., in proceedings supplementary to execution, and by an order then duly made by Hon. I.... K...., circuit judge of said county of [*or, county judge for the county of, or, a court commissioner for said county of*] the plaintiff was appointed receiver of the property of said M.... N....

IV. That thereafter, and before the commencement of this action, plaintiff gave the bond required by said order; that said bond was approved by the said and is, with such approval thereon, on file in the said court and was so filed prior to the commencement of this action.

V. That this plaintiff, as receiver aforesaid, was duly authorized to commence this action, by an order of the court of county duly made and entered on the day of, 19..

569. By receiver appointed in an action.

[Title of court and of cause.]

[Commencement as in preceding form.]

I. *[Cause of action.]*

II. That on the day of, 19.., at the of in an action then pending in the court of county, wherein M.... N.... was plaintiff and O.... P.... was defendant, upon an application made by said M.... N...., and by an order or determination duly made by said court, this plaintiff was appointed receiver of the property hereinafter described.

III. *[Allege giving and approval of bond, and leave to sue, as in preceding form.]*

570. By receiver of corporation in sequestration action.

[Title of court and of cause.]

[Commencement as in preceding forms.]

I. *[Allege incorporation of the company.]*

II. That on the day of, 19.., the plaintiff was duly appointed receiver of all the property and effects of the said X.... Y.... Company by this court [*or, by the court of county*] in an action brought therein by one C.... D.... against said company [*here describe the action in which the appointment was made with sufficient particularity to show that it was an action in which, under the statutes of the particular state a judgment of sequestration of the corporate property was proper.*]

III. That such proceedings were afterwards had in such action that on, 19.., judgment was made and entered therein, among other things sequestering the property of said X.... Y.... Company, and appointing said plaintiff receiver of its property and effects, with the usual power of receivers in such cases, and directing the distribution of its said property and effects among the creditors thereof. That said plaintiff

thereupon in all respects duly qualified as such receiver of said company, as required by said judgment, and the statutes of this state, and entered upon the duties of his said office, and still is such receiver.

IV. [*Allege leave to sue.*]

V. [*State facts showing cause of action.*]

571. Action by stockholder in the interest of the corporation, directors refusing to sue.

[*Title of court.*]

A.... B....,	}	Plaintiff,
vs.		
The X.... Y.... Company,		
a corporation, C.... D....		
E.... F.... and G....		
H...., Directors of said corporation, and M.... N....,		Defendants.

The plaintiff, complaining of the defendants, alleges:

I. [*Allege incorporation of the defendant corporation as in appropriate preceding form.*]

II. That the plaintiff is a stockholder of the said corporation owning and holding shares of the capital stock thereof.

III. [*Set forth cause of action against the defendant M.... N.... in favor of the corporation.*]

IV. That the reason this action is not brought by said corporation itself is that the defendants C.... D...., E.... F...., and G.... H...., who constitute the board of directors of said corporation, have refused and neglected to bring or prosecute the same, though requested by this plaintiff so to do, on or about the day of, 19..,

CHAPTER XX.

COMPLAINTS ON PROMISSORY NOTES.

- | | |
|---|--|
| 572. Payee against maker, pleading legal effect. | 591. On a note payable to bearer, or to order of the maker or a fictitious person. |
| 573. The same, setting forth copy of instrument. | 592. The same, pleading copy of note. |
| 574. On two notes, one partly paid. | 593. By first endorsee against endorsing payee. |
| 575. On note signed by agent. | 594. The same, pleading copy of note. |
| 576. On note made by partners. | 595. Remote endorsee against endorsing payee. |
| 577. On partnership note, alleging fact of partnership. | 596. Remote endorsee against his immediate endorser. |
| 578. By partners, on note payable to firm. | 597. Allegation of excuse for non-presentment, maker not found. |
| 579. By surviving partner, on a note payable to the order of his late firm. | 598. Allegation of waiver of demand and notice before or at maturity. |
| 580. By payee against surviving partner. | 599. The same, waiver after maturity. |
| 581. Against executor or administrator of maker. | 600. On a note of doubtful validity as against the maker. |
| 582. By executor or administrator of payee. | 601. Endorsee against maker and endorsing payee. |
| 583. By a corporation against a corporation. | 602. Remote endorsee against maker and two endorsers. |
| 584. Upon several notes, on agreement to pay all upon default in one. | 603. By payee against maker and endorser to give credit. |
| 585. On a note payable at a certain time after sight. | 604. Against maker and irregular endorser of non-negotiable note. |
| 586. On a note for a voluntary subscription, payable on conditions. | 605. By assignee against maker of negotiable note not endorsed. |
| 587. On a note wrongly dated. | 606. On note of a state bank. |
| 588. By first endorsee against maker. | |
| 589. The same, pleading note by copy. | |
| 590. By subsequent endorsee against maker. | |

572. Payee against maker, pleading legal effect.¹

[*Title of court and of cause.*]

The plaintiff, complaining of the defendant alleges:

I. That on or about the . . . day of . . . , 19 . . , the defendant made and delivered to the plaintiff his promissory note in

¹ It is provided in Nebraska sec. 1124) that if the action, counter-claim or defense be founded on

writing * dated on the said day, and thereby promised to pay to the plaintiff [or his order] at the sum of dollars months after said date [or on the day of , 19.. , or on demand] with interest at the rate of per cent per annum after date [or after maturity].

II. That no part of said note has been paid [except the sum of, &c.] and that the plaintiff is now the owner and holder thereof.

WHEREFORE the plaintiff demands judgment against the defendant for the sum of dollars, with interest thereon from the day of , 19.. , at per cent per annum, and for the costs and disbursements of this action.

573. The same, setting forth copy of instrument.²

[*Title of court and of cause.*]

[*Commencement.*]

I. That heretofore [or, on or about the day of , 19..] the defendant made and delivered to the plaintiff his certain promissory note in writing * of which the following is a copy: [*set out exact copy of note.*]

II. That no part of said note has been paid [except the sum of dollars, paid on the day of , 19..], and that there is now due the plaintiff thereon from the defendant the sum of dollars, with interest thereon from , 19.. , at the rate of per cent, which the plaintiff claims.

[*Demand for judgment as in Form 572.*]

an account, or on a note, bill or other written instrument as evidence of indebtedness, a copy thereof must be attached to and filed with the pleading except in actions founded on notes issued to circulate as money, and if not so attached and filed the reason thereof must be shown in the pleading. The Iowa Code (sec. 3561) makes it ground of demurrer to a petition founded on an account or writing as evidence of indebtedness that neither such writing nor account nor copy thereof is incorporated into or attached to the pleading, or a sufficient reason stated for not doing

so. In these states, therefore, the foregoing form appears to be insufficient, and Form 573 should be used.

² Most of the code states provide that in an action, counter-claim, or defense founded on an instrument for the payment of money only, it shall be sufficient to set forth a copy of the instrument and state that there is due the party thereon from the adverse party a specified sum which he claims. N. Y. Code C. P. sec. 534; Wis. Stats. 1898 sec. 2675; Cobbeys's Ann. Stats. of Nebr. sec. 1129; N. Dak. Rev. Codes sec. 5286; S. Dak. Rev. Code C. P. sec. 139.

574. On two notes, one partly paid.

[*Title of court and of cause.*]

[*Commencement.*]

First. For a first cause of action:

I. That heretofore the defendant made and delivered to plaintiff his promissory note in writing [*continue as in Form 572 or 573 from the **].

II. That no part thereof has been paid, except the sum of dollars, &c. [*continue as in Form 572 or 573*].

Second. For a second cause of action:

I. That heretofore the defendant made and delivered to plaintiff his other promissory note in writing [*continue as above*].

II. That no part thereof has been paid [*continue as in Form 572 or 573*].

WHEREFORE the plaintiff demands judgment against the defendant for the sum of [*aggregate principal*] with interest on dollars thereof from the day of, 19.., and with interest on dollars thereof from the day of, 19.., and for the costs and disbursements of this action.

575. On note signed by agent.

[*Title of court and of cause.*]

[*Commencement.*]

I. That heretofore [*or on or about the day of, 19..*] the defendant, by one M.... N.... his agent, [*or his attorney in fact*], duly authorized thereto, made and delivered to the plaintiff his promissory note in writing, [*continue as in Form 572 or 573 from the **].

576. On note made by partners.

[*Title of court and of cause.*]

[*Commencement.*]

I. That heretofore [*or on or about the day of, 19..*] the defendants, under their firm name of Y.... Z.... & Co., made and delivered to the plaintiff their promissory note in writing, [*continue as in Form 572 or 573 from the **].

577. On partnership note, alleging fact of partnership.

I. That at the time of the making of the note hereinafter mentioned the defendants were partners doing business at under the firm name of Y.... Z.... & Co.

II. That on the day of, 19.., the defendants under said firm name, made and delivered to the plaintiff their promissory note in writing, [*continue as in form 572 or 573 from the **].

578. By partners, on note payable to firm.

I. That at the time of the making and delivery of the note hereinafter mentioned the plaintiffs were partners doing business at under the firm name of A.... B.... & Co.

II. That heretofore [*or on or about the day of, 19..*] the defendant made and delivered to the plaintiffs his promissory note in writing, dated on the day of, 19.., and thereby promised to pay to these plaintiffs under their firm name of A.... B.... & Co. [*or their order*] dollars months after said date [*or on the day of, 19..*] [*or set forth copy of note as in Form 573.*]

III. [*Continue as in Form 572 or 573.*]

579. By surviving partner, on a note payable to the order of his late firm.

I. That at the time of the making of the note hereinafter mentioned, the plaintiff and one C.... D.... were partners doing business under the firm name of A.... B.... & Co.

II. That on the day of, 19.., the defendant made and delivered to said firm his promissory note in writing, dated on that day, and thereby promised to pay to them, under their said firm name [*or their order*] dollars, ... months after said date [*or on the day of, 19..*]

III. That no part thereof has been paid [*except the sum of, &c.*]

[*Or: set forth copy of note and following allegations as in Form 573.*]

IV. That on the day of, 19.., at said C.... D.... died, leaving the plaintiff the sole surviving partner of said firm.

580. By payee against surviving partner.

I. That at the time of the making of the note hereinafter mentioned the defendant and one W.... X.... were partners doing business under the firm name of Y.... Z.... & Co.

II. That on the day of, 19.., at the said partners, under their said firm name, made and delivered to the plaintiff their promissory note in writing, [*continue as in Form 572 or 573 from the * to the prayer for judgment*].

III. That on the day of, 19.., at said W.... X.... died, leaving the defendant the sole surviving partner of said firm.

[*Prayer for judgment.*]

581. Against executor or administrator of maker.

I. That heretofore [*or on or about the day of 19..*] one C.... D.... made and delivered to the plaintiff his promissory note in writing, [*continue as in Form 572 or 573 from the * to the prayer for judgment*].

II. [*Allege death of maker, and appointment of the defendant as administrator or executor, as in Forms 541 and 543*].

III. [*Prayer for judgment.*]

582. By executor or administrator of payee.

I. Upon information and belief that heretofore [*or on or about the day of 19..*] the defendant made and delivered to one C.... D.... his promissory note in writing, [*continue as in Form 572 or 573 from the * to the prayer for judgment*].

II. [*Allege death of maker, and plaintiff's appointment as executor or administrator, as in Forms 541 and 543*].

[*Prayer for judgment.*]

583. By a corporation, against a corporation.

I. [*Allege incorporation of plaintiff, as in Forms 538 et seq.*]

II. [*Allege incorporation of defendant, as in same Forms.*]

III. That heretofore [*or on or about the day of 19..*] the defendant, by C.... D.... its president [*or cashier, or other agent*], duly authorized thereto, made and delivered to the plaintiff its promissory note in writing [*continue as in Form 572 or 573*].

584. Upon several notes, on agreement to pay all upon default in one.

I. That upon the day of, 19.., the defendants were indebted to the plaintiffs in the sum of dollars.

II. That to secure the payment of that sum, and in consideration of the extension of credit thereby obtained, the defendants agreed to deliver, and did on said day make and deliver to the plaintiffs their promissory notes in writing, of which copies are hereto annexed and made a part of this complaint, marked Exhibits A, B, and C.

III. That at the same time, and in consideration of the acceptance of said notes, the defendants agreed with the plaintiffs

in writing that in case of any default in the payment of any of said notes at any time when the same should become due and payable, the whole amount of the said sum of dollars and interest then remaining unpaid, should forthwith, at the option of the plaintiffs, become at once due and payable.

IV. That the defendant has made default in the payment of the first of said notes, which became due and payable on the day of, 19.., and no part thereof has been paid, and the plaintiffs have duly exercised their said option, and have declared the whole of said debt due.

[*Prayer for judgment.*]

585. On a note payable at a certain time after sight.

I. [*Allege the execution of the note as in Forms 572 or 573.*]

II. That on the day of, 19.., at said note was duly presented to the defendant [*maker*] with notice that payment was required according to the terms thereof.

III. [*Set forth nonpayment and following formal allegations as in Forms 572 or 573.*]

[*Prayer for judgment.*]

586. On a note for a voluntary subscription, payable on conditions.

I. [*If plaintiff is a corporation, allege the fact as in Forms 538 et seq.*]

II. That the said defendant heretofore [*or, on or about the day of, 19..*] for a valuable consideration, made and delivered to the plaintiff his promissory note in writing, whereby he promised to pay to the plaintiff or order dollars, with interest, &c., payable [*here set forth condition upon which note was given, as*] when the sum of dollars shall have been in good faith subscribed toward the endowment of said institution [*or other condition, according to the fact*].

III. That prior to the commencement of this action the full sum of dollars was in good faith subscribed to the endowment of said institution, [*or allege compliance with the conditions of the note in apt terms*].

IV. [*Allege ownership and nonpayment of note, as in preceding forms.*]

[*Prayer for judgment.*]

587. On a note wrongly dated.

I. That on the day of, 19.., the defendant made and delivered to plaintiff his promissory note in writing,

bearing date by mistake on the day of, 19.., whereas in truth it was intended to bear date on said day of, 19.., thereby promising to pay the plaintiff [or his order] dollars, ... days after said [*intended date*].

II. [*Allege ownership and nonpayment, as in preceding forms.*]

[*Prayer for judgment.*]

588. By first indorsee against maker.

I. That heretofore the defendant [*maker*] made and delivered to one C.... D.... his promissory note in writing, dated on the day of, 19.., and thereby promised to pay to the order of said C.... D.... dollars months after said date, [*or, on the day of, 19..*].

II. That said C.... D.... thereafter [and before its maturity] indorsed and delivered the same to the plaintiff [for value].

III. That the plaintiff is now the lawful owner and holder of said note, that no part of the same has been paid [except the sum of dollars, etc.] and there is now due thereon from the defendant to the plaintiff the sum of dollars, with interest, etc.

[*Prayer for judgment.*]

589. The same, pleading note by copy.

I. That heretofore [*or on or about the day of, 19..*] the defendant made and delivered to one C.... D.... his promissory note in writing, of which the following is a copy, [*set out exact copy of note*].

II. That thereafter and before maturity [*or on or about the day of, 19..*] said C.... D.... sold and delivered said note to the plaintiff, and indorsed the same in the words following: "Pay to the order of A.... B...., C.... D.... " That no part of said note has been paid, that the plaintiff is still the owner and holder thereof, and there is now due thereon from the defendant to the plaintiff the sum of dollars, with interest, etc., which the plaintiff claims.

[*Prayer for judgment.*]

590. By subsequent indorsee against maker.

I. [*Allege execution of note, as in preceding forms.*]

II. That thereafter and before its maturity said note was duly indorsed and delivered by said C.... D.... to one E....

F...., who likewise thereafter and before its maturity indorsed and delivered said note to this plaintiff.

III. [*Allege ownership and nonpayment, as in preceding forms.*]

[*Prayer for judgment.*]

591. On a note payable to bearer, or to order of the maker or a fictitious person.

I. That heretofore the defendant [*maker*] made and delivered [to C.... D....] his promissory note in writing * dated on the day of, 19.., at, and thereby promised to pay to bearer, [*or, to C.... D.... or bearer, or, to bills payable or order, or to the order of the defendant*] dollars, ... months after said date, with interest, etc.

II. That the same thereafter and before maturity, [*if note was payable to defendant's own order*, was indorsed by said defendant in blank, and] came lawfully to the possession of the plaintiff [for value].

III. That no part thereof has been paid [except the sum of, etc.].

IV. That the plaintiff is now the lawful owner and holder of said note and that there is now due thereon from defendant to plaintiff the sum of, etc.

[*Prayer for judgment.*]

592. The same, pleading copy of note.

I. [*As in last preceding form to the **] of which the following is a copy: [*Set out copy of note*].

II. That thereafter, and before maturity thereof, said note [*if payable to defendant's own order*, was endorsed by the defendant in blank and] came lawfully to the possession of the plaintiff [for value].

III. That no part of said note has been paid [except; etc.] and there is now due thereon from the defendant to the plaintiff the sum of dollars, with interest, etc., which the plaintiff claims in this action.

[*Prayer for judgment.*]

593. By first endorsee against endorsing payee.

I. That heretofore one M.... N.... [*or M.... N.... & Co.*] made his [their] promissory note in writing, dated on the day of, 19.., and thereby promised to pay to the defendant [*or to the defendants, under their firm name of Y.... Z.... & Co.*] [*or order*] dollars, ... days after said date [*or, on, etc.*].

II. That the defendant [*indorser*] [*or, the defendants, indorsers, under their said firm name*] then and there [*or, thereafter and before this action*] indorsed and delivered the same to the plaintiff [*for value*].

III. That [*at maturity*] said note was duly presented for payment, and payment thereof demanded, but was not paid, whereupon said note was duly protested for nonpayment, of all of which due notice was given to the defendant [*indorser*].

IV. That the cost of said protest was dollars, which plaintiff was obliged to and did pay.

V. [*Allege nonpayment, and present ownership, as in preceding forms.*]

[*Prayer for judgment.*]

594. The same, pleading copy of note.

I. That heretofore [*or on or about the day of, 19..*] one C.... D.... [*or C.... D.... & Co.*] made and delivered to the defendant his [*or their*] promissory note in writing, of which the following is a copy [*set forth copy of note with exactness*].

[*Allegations II, III, and IV as in last preceding form.*]

V. That no part of said note, or the cost of protest thereof, has been paid [*except the sum of, etc.*] and there is now due from defendant to plaintiff thereon the sum of dollars [*with interest, etc.*] which the plaintiff claims.

[*Prayer for judgment.*]

595. Remote indorsee against indorsing payee.

[*Proceed as in either of the last two preceding forms, substituting for paragraph II as follows*]:

II. That the defendant [*or, the defendants, under their firm name of Y.... Z.... & Co.*] then and there [*or, thereafter*] indorsed the same in blank and delivered it so indorsed; and thereafter, and before maturity thereof it lawfully came to the possession of the plaintiff, who is now the owner and holder thereof for value.

596. Remote indorsee against his immediate indorser.

I. That heretofore one M.... N.... made and delivered his promissory note in writing, dated on the day of, 19.., and thereby promised to pay to the order of O.... P.... the sum of dollars days after said date [*or, on, etc.*] [*Or plead by copy as in Form 594.*]

II. That the said payee then and there [*or, thereafter*] in-

dorsed the same to the defendant [*or*, indorsed the same, and delivered it so indorsed].

III. That thereafter and before maturity thereof, the defendant indorsed and delivered the same to the plaintiff for value. [*Proceed with paragraphs III, IV, and V, as in Forms 593 or 594.*]

[*Prayer for judgment.*]

597. Allegation of excuse for nonpresentment, maker not found.³

[*Insert in place of allegation III, in Forms 593 or 594 the following*]:

III. That at the maturity of said note the plaintiff caused to be made diligent search and inquiry for said [*maker*] at [*the place of date*] in order that the same might be duly presented to him for payment, but he could not be found, and the same was not paid, and said note was then and there duly protested for nonpayment, of all which due notice was given to the defendant.

598. Allegation of waiver of demand and notice before or at maturity.

[*Insert in place of allegation III in Forms 593 or 594 the following*]:

III. That thereafter, and before maturity, [*or at maturity*] of said note, said indorser [*defendant*] duly waived [*in writing upon the back of said note*] presentment to and demand of payment from said [*maker*] and notice to the defendant of the nonpayment thereof.

599. The same, waiver after maturity.

[*Insert in place of allegation III in Forms 593 or 594 the following*]:

III. That the defendant, knowing that plaintiff had failed to present said note for payment, and to notify defendant of the non-payment thereof, heretofore [*or, on or about the . . . day of , 19..*] waived said omission, and promised to pay said note to the plaintiff.

³ If payment was to be made at a particular place, presentment and demand should be made at that place, even though the maker be not there, and such presentment

and demand alleged as in preceding forms; but if no place of payment is specified in the note this form should be used.

600. On a note of doubtful validity as against the maker.

I. That on or about the day of, 19.., the defendant indorsed and delivered to plaintiff a promissory note, made [*or, purporting to have been made*] by one M.... N.... on the day of, 19.., at for the sum of dollars, payable to the order of defendant [*or one O.... P....*] days after date [*and indorsed and delivered before maturity by the said O.... P.... to the defendant*].

[*Proceed as in Form 593, allegations III, IV, and V.*]

[*Prayer for judgment.*]

601. Indorsee against maker and indorsing payee.

I. That heretofore the defendant [*maker*] [*or the defendants, makers, under their firm name of W.... X.... & Co.*] made and delivered his [*their*] promissory note in writing* dated on the day of, 19.., at, and thereby promised to pay to the order of the defendant [*indorser*] [*or to the order of the defendants, indorsers, under their firm name of Y.... Z.... & Co.*] dollars, ... days after said date [*or on, etc.*] [*Or after the* set forth copy of note*].

[*Proceed as in Forms 593 or 594, depending upon whether legal effect of the note is pleaded or copy set out.*]

[*Prayer for judgment.*]

602. Remote indorsee against maker and two indorsers.

I. [*As in last preceding form.*]

II. That the defendants [*payees*] [*under their said firm name*] thereafter and before maturity thereof indorsed the said note and delivered the same so indorsed.

III. That thereafter and before maturity, the defendants [*naming later indorsers*] [*under their firm name of C.... D.... & Co.*] indorsed the same [*in blank*] and delivered it so indorsed, and thereafter and before its maturity it lawfully came to the possession of the plaintiff for value.

[*Proceed as in Forms 593 or 594 beginning with paragraph III.*]

[*Prayer for judgment.*]

603. By payee against maker and indorser to give credit.⁴

I. That on or about the day of, 19.., at the defendant C.... D.... made his promissory note in writing*

⁴ In those jurisdictions where a person not a party to the instrument, who indorses the same in blank before delivery in order to give credit to the maker, is considered a maker, allegations of

dated on that day, and thereby promised to pay to the order of the plaintiff at the sum of dollars, ... months after said date [*or on, etc.*] [*Or after the * insert: of which the following is a copy, setting out exact copy of note*].

II. That at the time of the making of said note, and prior to its delivery to plaintiff, the defendant E.... F.... indorsed said note for the purpose of inducing the plaintiff to accept the same and extend credit thereon, and with intent to charge himself as first indorser thereupon.

III. That thereupon the defendant C.... D.... delivered said note so indorsed to plaintiff, and that plaintiff, upon the credit of said endorsement, accepted said note and gave value therefor.

[*Proceed as in Forms 593 or 594 beginning with paragraph III.*]

[*Prayer for judgment.*]

604. Against maker and irregular indorser of non-negotiable note.⁵

I. That heretofore [*or on or about the day of, 19..*] the defendant A.... B.... [*maker*], for value received, made his certain promissory note in writing, of which the following is a copy:

“On demand I promise to pay to C.... D.... dollars, for value received, with interest from, 19.., at per cent per annum.

A.... B....”

Indorsed “E.... F....”

II. That prior to the delivery of the note the said defendant E.... F...., for valuable consideration and for the purpose of inducing plaintiff to sell and deliver certain merchandise to the defendant A.... B.... and accept said note therefor, placed his name upon and delivered to plaintiff said note so indorsed in order to secure payment thereof to plaintiff, and for the purpose of becoming liable to plaintiff for such payment, and said de-

protest, dishonor and notice will be unnecessary; but where the liability of such an indorser is that of an indorser only, the allegations are essential. *Blakeslee v. Hewitt*, 76 Wis. 341; *Wis. Laws of 1899 c. 356* (Neg. Inst. Law) secs.

1677—3, 1677—4; *Chap. 612 Laws of N. Y. 1897*.

⁵ An indorser of a non-negotiable note before delivery, for the purpose of giving credit to the maker, is an original promisor. *Gorman v. Ketchum*, 33 Wis. 427; *McMullen v. Rafferty*, 89 N. Y. 456.

fendant thereby became liable to plaintiff for the payment thereof.

III. That plaintiff, relying upon the representations of the defendants and upon the said indorsement, was thereby induced to and did sell and deliver said merchandise to said A.... B.... and accept said note to secure payment therefor.

IV. That thereafter the said note was delivered to the plaintiff, who is and ever since has been the legal holder and owner thereof, for value, and that there is due thereon from the defendants to plaintiff the sum of dollars, which plaintiff claims.

[Prayer for judgment.]

605. By assignee against maker of negotiable note not indorsed.

[Allege execution and delivery of note, as in Forms 572 or 573.]

II. That A.... B.... [payee] before maturity [or before this action] assigned and delivered said note to the plaintiff for a valuable consideration.

III. *[Allege nonpayment, ownership, &c., as in Forms 572 or 573.]*

[Prayer for judgment.]

606. On note of a state bank.

I. That the defendant is a corporation, created by and under the laws of this state, organized pursuant to Chapter of the Revised Statutes of this State and the acts amending the same, and was such corporation so organized at the times hereinafter set forth, and that their place of business then was, and still is, in the city of in this state.

II. That on the day of, 19.., the defendant, being such corporation, by its agents duly authorized thereto, made and executed its certain promissory note in writing, bearing date on said day, whereby it promised to pay to the bearer on demand, at its place of business within this state, the sum of dollars, and for value received delivered the same to some person unknown to this plaintiff, and loaned and circulated the same as money, according to the ordinary course of banking business as regulated by the laws and usages of this state.

III. That thereafter said promissory note was duly transferred and delivered to this plaintiff for value, and he was at the

time hereinafter stated possessed of the same, and became, and was, and still is the lawful owner and holder thereof.

That on the day of, 19.., between the hours of ten and three o'clock, and during the usual hours of business, this plaintiff duly presented the said note to the defendant at its said place of business, and where said note was payable, and lawfully demanded the payment and redemption of said note, which the defendants then and there refused, and no part of the same has been paid.

[Prayer for judgment.]

CHAPTER XXI.

COMPLAINTS ON BILLS OF EXCHANGE.

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| <p>607. Payee against acceptor.</p> <p>608. The same, pleading copy of bill.</p> <p>609. The same, on acceptance not according to terms of bill.</p> <p>610. The same, against acceptor for honor.</p> <p>611. The same, on a bill drawn and accepted by same person.</p> <p>612. The same, on a bill payable from a particular fund.</p> <p>613. On written promise to accept bill.</p> <p>614. By payee against drawer for non-acceptance.</p> <p>615. The same, pleading copy of bill.</p> | <p>616. The same, against corporation drawer.</p> <p>617. On a bill payable at sight, or at a certain time, for non-payment.</p> <p>618. The same, bill not having been presented because countermanded.</p> <p>619. The same, bill not presented because drawee not found.</p> <p>620. The same, demand and notice waived.</p> <p>621. By payee against drawer and acceptor.</p> <p>622. By payee, against drawer and acceptor for honor.</p> |
|---|--|

607. Payee against acceptor.

I. That on the day of, 19.., at one C.... D.... [*or* certain persons, under their firm name of C.... D.... & Co.] made his [their] bill of exchange in writing, dated on that day, directed to the defendant [*or* to the defendants under their firm name of E.... F.... & Co.] at, and thereby required the defendants to pay to the order of the plaintiff [*or*, of these plaintiffs, under their firm name of A.... B.... & Co.] dollars, ... days after said date [*or otherwise*] for value received.

II. That thereupon [*or* on the day of, 19.., at] the defendant [*or* the defendants, under said firm name] upon sight thereof accepted said bill.

III. That no part of said bill has been paid [except the sum of, &c.], and that the plaintiff is now the owner and holder of the same, and there is now due thereon the sum of dollars, with interest, &c.

[Prayer for judgment.]

608. The same, pleading copy of bill.

I. That on the day of, 19.., at the defendant [*or the defendants, under their firm name of E.... F.... & Co.*] accepted and delivered to the plaintiff a bill of exchange, of which the following is a copy: [*set forth exact copy of the bill and acceptance*].

II. That there is now due to the plaintiff thereon from the defendant the sum of dollars with [..... dollars damages and] interest, &c., which the plaintiff claims.

[*Prayer for judgment.*]

609. The same, on acceptance not according to terms of bill.

I. [*Follow either of two preceding forms.*]

II. That thereupon [*or on the day of, 19.., at]* the defendant [*or the defendants, under said firm name*] upon sight thereof, accepted the same, payable at days [*or otherwise*] after the date of said bill [*or after said date of acceptance*].

III. [*Follow appropriate preceding form.*]

[*Prayer for judgment.*]

610. The same, against acceptor for honor.

I. That on the day of, 19.., at one C.... [or certain persons, under their firm name of C.... D.... & Co.] made and delivered to the plaintiff, his [*or their*] bill of exchange in writing, dated on that day, and directed the same to one E.... F.... [*or, to certain persons, under their firm name of, &c. [and thereby required said E.... F.... to pay to the order of this plaintiff [or of these plaintiffs, under their firm name of A.... B.... & Co.] the sum of dollars, ... days after date thereof [or otherwise] for value received.*

II. That then and there [*or on the day of, 19.., at]* it was duly presented to said E.... F.... for acceptance, but was not accepted, and was thereupon duly protested for nonacceptance, of all which due notice was given to said [*drawers*].

III. That then and there [*or on the day of, 19.., at]* the defendant [*or the defendants, under their firm name of G.... H.... & Co.*] upon sight thereof, accepted said bill for the honor of said [*drawer*].

IV. That at maturity the same was duly presented for payment to said E.... F.... [*the drawee*] but was not paid, and was thereupon duly protested for nonpayment, of all which due

notice was given to the defendant [*acceptor for honor*] and to said M.... N.... [*drawer*].

V. That no part of the same has been paid [except the sum of, &c.] and that the plaintiff is now the owner and holder of said bill.

[*Prayer for judgment.*]

611. The same, on a bill drawn and accepted by same person.

I. That on the day of, 19.., at the defendant [*or*, the defendants, under their firm name of C.... D.... & Co.] made and accepted and delivered to the plaintiff his [their] bill of exchange in writing, of which the following is a copy: [*Set forth exact copy of the bill and acceptance*].

II. That there is now due to the plaintiff thereon, from the defendant, the sum of dollars, with interest from, &c., which the plaintiff claims.

[*Prayer for judgment.*]

612. The same, on a bill payable from a particular fund.

I. That on the day of, 19.., at one C.... D.... made his [*or* certain persons, under their firm name, &c., made their] bill of exchange or order in writing, dated on that day, and directed it to the defendant [*or* to the defendants, under their firm name of, &c.] and thereby required the defendant to pay to one E.... F.... out of the proceeds of [*state fund as in the bill*] dollars, ... days after the date [*or* sight] thereof [*or otherwise*] for value received, and delivered it to said [*payee*].

II. That on the day of, 19.., at [*or then and there*] upon sight thereof, the defendant accepted the same, payable when in funds, from the proceeds of, &c. [*state terms of acceptance as made*].

III. [*If plaintiff is assignee of the bill, state assignment as follows*]: That on the day of, 19.., at said [*payee*] duly assigned said bill for value to this plaintiff.

IV. That on the day of, 19.., the defendant had in his hands funds of the said [*drawer*] to the amount of dollars, being the proceeds of [*state fund as in bill*].

V. That payment of said bill was, on the day of, 19.., at duly demanded by this plaintiff from the defendant, but was refused.

VI. That no part thereof has been paid [except the sum of, &c.] and that plaintiff is now the owner and holder thereof.

[*Prayer for judgment.*]

613. On written promise to accept bill.

I. That on or about the day of, 19.., at, the defendant, for value received, promised in writing to accept sight drafts to the amount of dollars, to be drawn by the firm of A.... B.... & Co., as drawers, on him, the defendant, as drawee.

II. That in pursuance of said written promise, the said firm of A.... B.... & Co., at on the day of, 19.., drew their certain bill or draft on the said defendant, in words and figures following: [*set out exact copy of bill*].

III. That the plaintiff, relying upon the faith of the said written promise of defendant to accept the said bill, received the same for a valuable consideration, and paid therefor the said sum of dollars, and is now the owner and holder of said bill.

IV. That plaintiff thereafter, and on or about the day of, 19.., caused the said bill to be duly presented to defendant for acceptance and payment, and demanded of defendant that he should accept and pay the same, and that he declined and refused to accept or pay said bill, whereupon the said bill was duly protested for non-acceptance, and of which demand of acceptance, non-acceptance and non-payment defendant and said firm of A.... B.... & Co. had due notice.

V. That said bill is now owned and held by the plaintiff, that the same remains wholly unpaid, and there is now due and owing thereon the sum of dollars, with interest thereon from, 19.., which plaintiff claims.

614. By payee against drawer for non-acceptance.

I. That on the day of, 19.., at the defendants [*drawers*] [under their firm name of C.... D.... & Co.] made and delivered to the plaintiff their bill of exchange in writing, dated on that day, and directed the same to one E.... F.... [*or to certain persons, under the firm name of E.... F.... & Co.*] and thereby required said [*drawee*] to pay to the order of this plaintiff [*or of these plaintiffs, under their firm name of A.... B.... & Co.*] dollars days after the date [*or sight*] thereof, for value received.

II. That the same was thereafter duly presented to [*the drawee*] for acceptance, but was not accepted, and was thereupon duly protested for non-acceptance, of all which due notice was given to the defendant [*drawer*].

III. That the cost of such protest was dollars, which the plaintiff has paid.

IV. That no part of the same has been paid [except the sum

of, &c.] and that plaintiff is now the owner and holder of said bill, and there is now due thereon the sum of dollars [with dollars damages¹] and interest from, &c.

[*Prayer for judgment, including damages if recoverable.*]

615. The same, pleading copy of bill.

I. That on the day of, 19.., at the defendants [*drawers*] [under their firm name of C.... D.... & Co.] made and delivered to the plaintiff their bill of exchange in writing, of which the following is a copy: [*Set out exact copy of the bill*].

II. That the same was duly presented to [*the drawee*] therein named for acceptance, but was not accepted, and was thereupon duly protested for non-acceptance, of all which due notice was given to the defendant [*drawer*].

III. That the cost of such protest was dollars, which was paid by the plaintiff.

IV. That there is now due to the plaintiff thereon the sum of dollars, [with dollars damages] and interest from, &c., which the plaintiff claims.

[*Prayer for judgment.*]

616. The same, against corporation drawer.

I. [*Allege incorporation of defendant, as in Forms 538, 539 and 540.*]

II. [*Allege making and delivery of bill, as in Forms 614 or 615.*]

III. That the same was duly presented to said C.... D.... [*drawee*] for payment, but payment thereof was refused, and the same was thereupon duly protested for non-payment, of all which due notice was given to the defendant.

IV. That the cost of said protest was dollars, which sum was paid by the plaintiff and has not been repaid to him.

V. That plaintiff is now the owner and holder of said bill, that no part thereof has been paid, and there is now due from defendant to plaintiff thereon the sum of dollars, with interest, &c., which the plaintiff claims.

[*Prayer for judgment.*]

¹ When by statute damages are recoverable upon protested bills of exchange, the complaint should allege the amount and demand judgment therefor. Wis. Laws 1899 c.

356 (Neg. Inst. Law) sec. 1682, 1683; Cobbe's Ann. Stats. of Nebr. sec. 8906; N. Dak. Rev. Codes sec. 4957; S. Dak. Rev. Codes, C. C. sec. 2271, 2272.

617. On a bill payable at sight, or at a certain time, for non-payment.

I. That on the day of, 19.., at, the defendants [*drawers*] [under their firm name of, &c.] made and delivered to the plaintiff their bill of exchange in writing, dated on that day, and directed the same to one C.... D.... [*or to certain persons, under their firm name of, &c.*] and thereby required said [*drawee*] to pay to the order of this plaintiff [*or, of these plaintiffs, under their firm name of, &c.*] dollars on the day of, 19.., [*or, at sight, or, ... days after the date thereof, or otherwise*] for value received.

II. That the same was duly presented to [*the drawee*] for payment but was not paid, and was thereupon duly protested for non-payment, of all which due notice was given to the defendant [*drawer*].

III. [*Allege ownership, non-payment, &c., as in preceding forms.*]

IV. That no part of the same has been paid [except the sum of, &c.]

[*Prayer for judgment.*]

618. The same, bill not having been presented because countermanded.

I. [*Allege making and delivery of bill, as in immediately preceding forms.*]

II. That on or about the day of, 19.., said bill not then having been presented for acceptance [*or for payment*], the defendant countermanded the same and instructed the said [*drawee*] not to accept or pay [*or, if payable at sight, not to pay*] the same; wherefore said bill was not presented to the said [*drawee*].

III. [*Allege ownership, non-payment, &c., as in preceding forms.*]

[*Prayer for judgment.*]

619. The same, bill not presented because drawee not found.

I. [*Allege making and delivery of bill, as in immediately preceding forms.*]

II. That on or about the day of, 19.., the plaintiff caused diligent search and inquiry to be made for said drawee at [*the place of address*] in order that the said bill might be presented to him for acceptance, but he could not be found, and the same was not accepted, and was thereupon duly protested for

non-acceptance, of all which due notice was given to the defendant [*drawer*].

III. [*Allege payment of protest fees, also ownership and non-payment, as in preceding forms.*]

[*Prayer for judgment.*]

620. The same, demand and notice waived.

I. [*Allege making and delivery of bill, as in preceding forms.*]

II. That the defendant at the time said bill was executed and delivered by him, waived as well the presentation of the same to said C.... D.... for payment, as notice of the non-payment thereof, and no part thereof has been paid.

III. [*Allege ownership, as in preceding forms.*]

[*Prayer for judgment.*]

621. By payee against drawer and acceptor.

I. That on the day of, 19.., at the defendants [*drawers*] [under their firm name of C.... D.... & Co.] made and delivered to the plaintiff their bill of exchange in writing, dated on that day, and directed the same to the defendant [*acceptor*; or, to the defendants, *acceptors*, under their firm name of E.... F.... & Co.] and thereby required said [*acceptor*] to pay to the order of the plaintiff [*or of the plaintiffs*, under their firm name of A.... B.... & Co.] dollars, ... days after the date thereof [*or otherwise*] for value received.

II. That then and there[*or on the day of, 19.., at*] the defendant [*acceptor*] upon sight thereof, accepted said bill.

III. That at maturity the same was duly presented to the defendant [*acceptor*] for payment, but was not paid and was thereupon duly protested for non-payment, of all which due notice was given to the defendant [*drawer*].

IV. That no part of the same has been paid, and that the cost of such protest was the sum of dollars, which was paid by this plaintiff, and has not been repaid to him.

[*Prayer for judgment.*]

622. By payee, against drawer and acceptor for honor.

I. That on the day of, 19.., at the defendants [*drawers*] [under their firm name of C.... D.... & Co.] made and delivered to the plaintiff their bill of exchange in writing, dated on that day, and directed the same to one E.... F.... [*or, to certain persons, under their firm name of E....*]

F.... & Co.] and thereby required said [*drawee*] to pay to the order of this plaintiff [*or of these plaintiffs, under their firm name of A.... B.... & Co.*] dollars, ... days after the date thereof [*or otherwise*] for value received.

II. That then and there [*or on the day of, 19.., at*] said bill was duly presented to said [*drawee*] for acceptance, but was not accepted, and was thereupon duly protested for non-acceptance, of all which due notice was given to the defendant [*drawer*].

III. That then and there [*or, on the day of, 19.., at*] the defendant [*acceptor for honor*] upon sight thereof, accepted said bill for the honor of said [*drawer*].

IV. That at maturity the same was duly presented for payment to said [*drawee*] but was not paid, and was thereupon duly protested for non-payment, of all which due notice was given to the defendants [*drawers*].

V. That thereupon the same was duly presented to the defendant [*acceptor for honor*] for payment, but was not paid, and was thereupon duly protested for non-payment, of all which due notice was given to the defendants [*drawers*].

VI. That the plaintiff necessarily paid the costs of the said various protests, amounting to the sum of dollars, none of which has been repaid to him.

VII. That said bill is now held and owned by plaintiff, and no part thereof has been paid.

[*Prayer for judgment.*]

CHAPTER XXII.

COMPLAINTS ON CHECKS AND CERTIFICATES OF DEPOSIT.

- | | |
|---|--|
| 623. Payee against drawer, pleading legal effect. | 627. Indorsee or bearer against drawer. |
| 624. The same, pleading copy. | 628. Indorsee or bearer against drawer and endorser. |
| 625. The same, alleging excuse for failure to give notice of non-payment. | 629. Against bank, on a certified check. |
| 626. The same, alleging excuse for non-presentment. | 630. Upon a certificate of deposit by indorsee |

It may be stated as a general principle that presentment and notice of non-payment are necessary to charge the drawers of a check. The ordinary check, being payable on demand, must be presented for payment within a reasonable time after its issuance, or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay. Twenty-four hours, as a general rule, is allowed for presentment of a check after its issuance. *Grange v. Reigh*, 93 Wis. 522. If the drawees have failed and suspended business, or if they have no funds in their hands belonging to the drawer, presentment and notice of non-payment are not necessary, but the fact excusing non-presentment should be alleged in the pleading

623. Payee against drawer, pleading legal effect.

I. That on the day of, 19.., at the defendant made and delivered to the plaintiff his check in writing, dated on that day, and directed the same to the Bank of M.... N.... [or to certain persons, under the firm name, &c.] and thereby required said [drawee] to pay to the plaintiff or order [or bearer] dollars, for value received.

II. That the same was duly endorsed by the plaintiff and presented to the said [drawee] for payment, but was not paid, of all which due notice was given to the defendant [drawer].

III. That no part of the same has been paid.

WHEREFORE, etc.

624. The same, pleading copy.

I. That on the day of, 19.., at the defendant drew and delivered to plaintiff his check in writing, of which the following is a copy:

“, ..., 19..
First National Bank of pay to A.... B.... or order
[or bearer], ... dollars, for value received.

C.... D....”

II. That thereafter said check was duly endorsed by plaintiff, and on the day of, 19.., was duly presented to the said bank for payment, but was not paid, of all of which said defendant had due notice.

III. That no part thereof has been paid and there is due the plaintiff thereon from defendant dollars, with interest from the day of, 19..

WHEREFORE, etc.

625. The same, alleging excuse for failure to give notice of non-payment.

[Proceed as in either of the two preceding forms, inserting in place of paragraph II the following]:

II. That thereafter the same was duly endorsed by plaintiff, and was duly presented to said [drawee] for payment, but the defendant has no funds with said [drawee] and no part of the same has been paid.

WHEREFORE, etc.

626. The same, alleging excuse for non-presentment.

[Proceed as in preceding forms, inserting the following in place of paragraph II]:

II. That on the day of, 19.., said [drawee] was insolvent [or, had stopped payment] and no part of the same has been paid.

WHEREFORE, etc.

627. Indorsee or bearer against drawer.

I. That on the day of, 19.., at the defendant made his check in writing, dated on that day, and directed the same to the bank of M.... N.... [or, to certain persons, under their firm name of, &c.] and thereby required said [drawees] to pay to one E.... F.... or order [or bearer] dollars, for value received.

II. That defendant then and there delivered the same to said E.... F.... [if payable to order, add: who indorsed the same

and delivered it so indorsed], and the same thereafter came lawfully to the possession of this plaintiff.

III. That thereafter the same was duly presented to said [drawee] for payment, but was not paid, of all which due notice was given to the defendant.

IV. That no part of the same has been paid.

WHEREFORE, etc.

628. Indorsee or bearer against drawer and indorser.

I. That on the day of, 19.., at the defendant [drawer] made his check in writing, dated on that day, and directed the same to the bank of M.... N.... [or, to certain persons under the firm name, &c.], and thereby required said [drawee] to pay to the defendant [indorser] or order [or bearer] dollars, for value received, and delivered it to the defendant [indorser].

II. That thereupon said defendant [indorser, or, the defendants, indorsers, under their firm name of, &c.] indorsed the same to this plaintiff [or, indorsed the same and delivered it so indorsed, and thereafter it came lawfully into the possession of this plaintiff] for value.

III. That said check was thereafter duly presented to the said [drawee] for payment, but was not paid, of all which due notice was given to defendants.

IV. That no part of the same has been paid,

WHEREFORE, etc.

629. Against bank, on a certified check.

I. That the defendant is a corporation duly incorporated under the laws of this state, and doing a banking business at the of in said state.

II. That on the day of, 19.., at one M.... N.... made his check [or, certain persons, under their firm name of M.... N.... & Co., made their check] in writing, bearing date on that day, and directed it to the defendant, and thereby required it to pay to this plaintiff or order [or bearer] dollars, for value received; and delivered the same to this plaintiff [or, if payable to a third party, state it as in preceding form].

III. That then and there [or, on the day of, 19.., at] the defendants, by their agent duly authorized thereto in writing, accepted the said check and certified the same to be good.

IV. That thereafter the same was duly presented for payment, but no part thereof has been paid.

WHEREFORE, etc.

630. Upon a certificate of deposit by indorsee.

I. [*Allege defendant's corporate capacity if the action be against a corporation, as in last preceding form.*]

II. That on or about the day of, 19.., the defendant, in consideration of the sum of dollars, then paid to it, issued a certain certificate of deposit to the order of one E.... F.... for the sum of dollars, whereby defendant agreed to pay the said amount on the return of said certificate of deposit properly indorsed; the following being a true copy of the said certificate: [*insert exact copy of certificate*].

III. That the said certificate was thereafter properly endorsed by said E.... F.... and was transferred and for value delivered to the plaintiff, and on or about the day of, 19.., was duly endorsed by the plaintiff and presented for payment to the defendant and payment thereof was refused.

IV. That plaintiff is the lawful owner and holder of said certificate, and that no part thereof has been paid.

WHEREFORE, etc.

CHAPTER XXIII.

COMPLAINTS FOR MONEY LOANED, PAID, HAD, AND RECEIVED.

- | | |
|--|---|
| <p>631. For money loaned.</p> <p>632. For money paid to another at defendant's request.</p> <p>633. For money paid to discharge another's debt.</p> <p>634. The same, amount to be repaid on a day certain.</p> <p>635. By accommodation maker of note, having paid it.</p> <p>636. By acceptor without funds, having paid it.</p> <p>637. By indorser of note, having paid part.</p> <p>638. By one joint maker of note against the other, for contribution.</p> <p>639. By landlord against tenant to recover tax which tenant had agreed to pay.</p> <p>640. By surety on lease, against principal.</p> <p>641. By surety, on appeal bond or undertaking.</p> <p>642. By surety for goods sold another.</p> | <p>643. For money received, common form.</p> <p>644. For money collected by agent.</p> <p>645. For money overpaid, relying on erroneous account,</p> <p>646. Money overpaid under mistake of fact.</p> <p>647. For money paid on contract for services, not performed.</p> <p>648. For money paid on contract to purchase real estate.</p> <p>649. For money paid on contract to purchase real estate, void by statute of frauds.</p> <p>650. By pledgor of collateral, to recover excess of money collected by pledgee.</p> <p>651. To recover amount paid on a judgment afterwards reversed.</p> <p>652. For money received by factor for goods sold.</p> <p>653. Against factor for goods sold on <i>del credere</i> commission.</p> <p>654. Against broker for proceeds of note discounted.</p> |
|--|---|

631. For money loaned.

That on the day of, 19.., the plaintiff loaned to defendant the sum of dollars, which sum defendant agreed to repay [with interest] upon demand [*or, on the day of, 19..*]

II. That thereafter and before this action [*or, on the day of, 19..*] plaintiff duly demanded payment of the same from defendant, but no part thereof has been paid [*except, state payments if any*] and defendant is now justly indebted therefor to this plaintiff in the sum of dollars, with interest from the day of, 19.. [*if it was to be repaid on demand, claim interest from day of demand*].

WHEREFORE, etc.

632. For money paid to another at defendant's request.

I. That on the day of, 19.., at the request of defendant, the plaintiff paid to one E.... F.... dollars.

II. That in consideration thereof, the defendant promised to repay the same to plaintiff [on demand].

III. That [on the day of, 19.., plaintiff demanded payment of the same from defendant, but] he has not repaid the same.

WHEREFORE, etc.

633. For money paid to discharge another's debt.

I. That on the day of, 19.., the plaintiff paid to one E.... F.... for the use of defendant and at his request, the sum of dollars, the same being the amount of a certain promissory note then owing by defendant to said E.... F.... [*or otherwise describe the debt*].

II. That defendant then and there agreed to repay the same upon demand.

III. That this plaintiff on the day of, 19.., at, duly demanded payment of the same from defendant, but no part thereof has been paid [*or, no part thereof has been paid except, &c.*]

WHEREFORE, etc.

634. The same, amount to be repaid on a day certain.

I. [*As in last preceding form.*]

II. That defendant promised to repay said sum [*with interest*] to this plaintiff on the day of, 19.., but has not paid any part thereof [*except, &c.*]

WHEREFORE, etc.

635. By accommodation maker of note, having paid it.

I. That on the day of, 19.., the plaintiff made and delivered to defendant his promissory note, of which the following is a copy: [*Insert exact copy of note*].

II. That plaintiff received no consideration therefor, but the same was an accommodation note given to defendant at his request and upon his promise to pay it at maturity.

III. That as plaintiff is informed and believes, defendant thereafter and before its maturity, negotiated said note for value.

IV. That defendant did not pay said note at maturity, and that plaintiff was thereupon compelled to and did, on the day of, 19.., pay the sum of dollars in dis-

charge of said note, and that no part of the said sum has been paid to the plaintiff.

WHEREFORE, etc

636. By acceptor without funds, having paid it.

I. That defendant on the day of, 19.., became indebted to plaintiff for moneys advanced by him, and by him paid, in taking up a certain draft drawn by defendant, bearing date on the day of, 19.., whereby they requested this plaintiff days after date to pay to one E.... F.... the sum of dollars.

II. That plaintiff duly accepted said draft and paid the same at maturity, without funds of the defendant in his hands to meet the same, and that no part of the same has been repaid by the defendant.

WHEREFORE, etc.

637. By indorser of note, having paid part.

I. That on the day of, 19.., the defendant made and delivered to this plaintiff his promissory note in writing, of which the following is a copy: [*Insert exact copy of note*].

II. That thereafter and before maturity of said note the plaintiff indorsed and negotiated it for value.

III. That at its maturity, said note was duly presented for payment to defendant [*or allege excuse for non-presentment*] but was not paid, wherefore this plaintiff had due notice, and that thereafter this plaintiff was compelled to pay and did pay, on the day of, 19.., to one E.... F.... the holder of said note, on account of the amount due thereon from defendant, the sum of dollars, no part of which has been repaid to the plaintiff.

WHEREFORE, etc.

638. By one joint maker of note against the other, for contribution.

I. That on the day of, 19.., this plaintiff and the defendant made and delivered to one E.... F.... their joint [*or joint and several*] promissory note in writing, of which the following is a copy: [*Insert exact copy of note*].

II. That at the maturity of said note plaintiff was compelled to pay and did pay the same; and no part thereof has been repaid to him.

WHEREFORE, etc.

639. By landlord against tenant to recover tax which tenant had agreed to pay.

I. That at on or about the day of, 19.., plaintiff and defendant entered into an agreement, of which the following is a copy: [*insert agreement or lease*] [*or, of which a true copy is attached hereto, made a part of this complaint, and marked Exhibit A*].

II. That while the covenants of the aforesaid agreement were in full force, and defendant was in possession of the premises by virtue thereof, a tax of dollars was duly levied upon the said premises, which defendant neglected to pay [and that said plaintiff was not aware, until on or about the day of, 19.., of such neglect].

III. That by reason thereof plaintiff was, on the day of, 19.., compelled to pay and did pay the said sum of dollars, with dollars arrearages of interest, amounting in the whole to dollars.

IV. That no part thereof has been repaid.

WHEREFORE, etc.

640. By surety on lease, against principal.

I. That on or about the day of, 19.., defendant entered into an agreement in writing with one E.... F...., of which the following is a copy: [*Insert copy of lease*] [*or, an agreement in writing whereby he hired of E.... F.... the house [designating it] for the term of and agreed to pay therefor, to the said E.... F...., the rent of dollars in equal quarterly installments*].

II. That at the request of defendant the plaintiff made and delivered to defendant his guaranty thereon in writing, of which the following is a copy: [*setting it forth*] [*or, his guaranty thereon in writing, whereby in consideration of one dollar plaintiff guaranteed the faithful performance on the part of the defendant of the said agreement*].

III. That defendant delivered said agreement and guaranty to E.... F...., and thereupon and in consideration thereof, obtained and had possession of said premises, pursuant to said agreement, whereby the defendant became liable to the said E.... F.... for the rent therein named.

IV. That a portion of said rent, to-wit, the installment of dollars which became due on the day of, 19.., the said defendant failed to pay.

V. That plaintiff was compelled to pay, and did pay, on the day of, 19.., to the said E.... F.... at his re-

quest and to the use of defendant, the sum of dollars, being the aforesaid sum, with interest, and that no part of the same has been repaid to plaintiff

WHEREFORE, etc.

641. By surety, on appeal bond or undertaking.

I. That on the day of, 19.., one E.... F.... recovered in the court of county a judgment against defendant for dollars [*or* for the possession of specific property, &c.] from which said defendant thereafter duly appealed to the supreme court of the state of [*or* other court].

II. That on the day of, 19.., at the request of defendant, plaintiff executed an undertaking, a copy of which is hereto annexed and marked Exhibit A, [*or*, whereby he undertook, *reciting the obligation*].

III. That on the day of, 19.., the said judgment was affirmed by the said supreme court with dollars costs and damages.

IV. That on the day of, 19.., the plaintiff was compelled to pay and did pay dollars upon the said undertaking, to the said E.... F...., and that no part of the same has been repaid to him.

WHEREFORE, etc.

642. By surety for goods sold another.

I. That on the day of, 19.., at the plaintiff, at the request of defendant, bought of one E.... F...., to be by him delivered to defendant and to his use, certain goods, viz: of the value of dollars, which were thereafter delivered to defendant, but he failed to pay for them.

II. That on the day of, 19.., in an action brought to recover from plaintiff the price of said goods, said E.... F.... recovered judgment in the court of county against the plaintiff, then defendant, for the sum of dollars, being the amount of said price, with interest and costs.

III. That plaintiff was compelled to pay, and did pay, on the day of, 19.., to said E.... F.... the sum of dollars, being the amount of the said judgment, and interest thereon; and that no part of the same has been repaid to him.

WHEREFORE, etc.

643. For money received, common form.¹

I. That on the day of, 19.., [*or*, at sundry times between the day of, 19.., and the day of, 19..] the defendant received from one E.... F.... [*or*, received from the plaintiff] the sum of dollars, to the use of the plaintiff.

II. That thereafter, and before this action, the plaintiff demanded payment thereof from the defendant.

III. That no part thereof has been paid, [*except, &c.*]

WHEREFORE, etc.

644. For money collected by agent.

I. That at and prior to the dates hereinafter mentioned the defendant was the agent of the plaintiff for the purpose of collecting and paying over to the plaintiff moneys due the plaintiff for goods sold in his business as a merchant.

II. That defendant, as such agent, between the day of, 19.., and the day of, 19.., collected and received certain sums amounting in all to the sum of dollars, as more particularly set forth in Exhibit A hereto attached.

III. That there is now due and owing to plaintiff from said defendant, on account of said collections, the sum of dollars.

IV. That plaintiff, prior to the commencement of this action, demanded payment thereof from defendant, but that no part thereof has been paid.

WHEREFORE, etc.

645. For money overpaid, relying on erroneous account.

I. That prior to the day of, 19.., plaintiff and defendant had numerous business transactions together, and that defendant, on or about the day of, 19.., rendered an account thereof to the plaintiff showing an indebtedness of plaintiff to the defendant in the sum of dollars, a true copy of which account is attached hereto and marked Exhibit A.

II. That the plaintiff, supposing said account to be correct and relying thereon, paid to the defendant said amount.

¹ This form was held sufficient in *Grannis v. Hooker*, 29 Wis. 65, as against a demurrer *ore tenus*, and it was further held that under it the plaintiff might show that the money sued for was pro-

cured by means of fraud. Whether the complaint is not susceptible of motion to make more definite and certain was suggested but not decided.

III. That said account was not correctly stated, but that the following items thereof were incorrect: [*here specify erroneous items*] whereby plaintiff was overcharged the sum of dollars.

IV. That plaintiff, prior to the commencement of this action, demanded payment thereof from defendant, but that no part thereof has been paid.

WHEREFORE, etc.

646. Money overpaid under mistake of fact.²

I. That the plaintiff, on or about the day of, 19.., purchased of defendant 35 head of native, and 257 head of Texas cattle, and agreed to pay therefor 4½ cents per pound for the native, and 4 cents per pound for the Texas cattle, gross weight, but by agreement between plaintiff and defendant, one E.... F.... was chosen to weigh said cattle on defendant's scales, and keep an account of the actual gross weight thereof.

II. That pursuant to such agreement, said E.... F.... did weigh all of said cattle and keep an account thereof.

III. That in so weighing said cattle said E.... F.... by mistake supposed, and so stated in his said account, that said native cattle weighed 33,530 lbs. and said Texas cattle 194,405 lbs., when in truth and in fact said native cattle actually weighed only 22,030 lbs. and said Texas cattle 180,770 lbs.

IV. That plaintiff, supposing said account so kept by said E.... F.... to be correct, and relying thereupon, paid defendant for 23,530 lbs. of said native cattle 4½ cent per pound, and also paid for 194,405 lbs. of said Texas cattle 4 cents per pound, amounting in all to the sum of dollars.

V. That after the weighing of said cattle and the payment thereof as aforesaid, plaintiff ascertained that by reason of said mistake so made in the weight of said cattle, he had paid defendant for thousand pounds of cattle which he had never received, amounting in all to the sum of dollars.

VI. [*Allege demand and refusal.*]

WHEREFORE, etc.

647. For money paid on contract for services, not performed.

I. That on the day of, 19.., the plaintiff entered into an agreement with defendant, whereby defendant undertook to render his services to the plaintiff as for the term of in consideration of the sum of dollars, to be paid therefor by the plaintiff.

² Adapted from *Billings v. McCoy*, 5 Nebr. 187.

II. That on the day of, 19.., the plaintiff paid to defendant, on account of his services to be rendered thereafter, in pursuance of said agreement, the sum of dollars.

III. That defendant wholly neglected and refused to render said services [*or, refused to render any services after, 19..*] although this plaintiff has been ready to receive and pay for the same, and that no part of said sum has been repaid to plaintiff, although frequently demanded by plaintiff prior to the commencement of this action.

WHEREFORE, etc.

648. For money paid on contract to purchase real estate, not performed.

I. That on the day of, 19.., the defendant and plaintiff entered into a contract in writing, subscribed by defendant, for the purchase by plaintiff of the defendant of certain real estate in the city of for the sum of dollars, to be paid therefor by plaintiff, a true copy of which agreement is attached hereto and marked Exhibit A.

II. That plaintiff then and there deposited in the hands of said defendant the sum of dollars as a part of the said purchase money of said real estate in case such sale should be completed and a deed conveying good title should be delivered by defendant as in said agreement specified, but to be returned to him if defendant should fail to fulfill said agreement.

III. That plaintiff duly performed all the conditions of said contract on his part, and on the day of, 19.., duly offered the defendant to receive a deed of said premises and pay the balance of the purchase money therefor.

IV. That defendant, on said day of, 19.., failed and refused to deliver to plaintiff a deed of the premises pursuant to the agreement, and has ever since refused to deliver said deed.

V. [*Allege demand for repayment, and refusal.*]

WHEREFORE, etc.

649. For money paid on contract to purchase real estate, void by statute of frauds.*

I. That on the day of, 19.., and prior thereto, defendant owned certain real estate described as follows: [*insert description*] and that on said day of, 19.., plaintiff and defendant entered into a verbal agreement by which defendant agreed to sell and convey to plaintiff the said real es-

* Adapted from complaint in *Cuddy v. Foreman*, 107 Wis. 519.

tate for the sum of dollars, and said plaintiff agreed to purchase the same and pay therefor the said sum of dollars.

II. That plaintiff then and there paid defendant the sum of \$100 as part of the purchase price of said real estate, and defendant received said sum upon said verbal agreement.

III. That no part of said agreement was ever reduced to writing, nor was any memorandum thereof made or signed by either of said parties, and that plaintiff did not at any time take possession of said real estate, nor did defendant surrender possession thereof.

IV. That said verbal agreement was and is null and void, and that no part of the same was ever carried out, except that said \$100 was paid by plaintiff to defendant.

V. That on the day of, 19.., the plaintiff demanded repayment from defendant of the said sum of \$100, but that defendant refused to repay the same.

WHEREFORE, etc.

650. By pledgor of collateral, to recover excess of money collected by pledgee.

I. That on the day of, 19.., the plaintiff, being then indebted to defendant in the sum of dollars, endorsed and delivered ~~to~~ said defendant, as a collateral security for the payment of the same, a certain promissory note [*describe note*].

II. That at its maturity the note was collected by defendant, and by the application of the moneys so received by him said indebtedness was wholly paid and extinguished.

III. That after payment of said indebtedness there remained in the hands of the defendant a balance of dollars, belonging to this plaintiff, payment of which plaintiff demanded of defendant on the day of, 19.., but no part thereof has been paid.

WHEREFORE, etc.

651. To recover amount paid on a judgment afterwards reversed.

I. That on or about the day of, 19.., defendant recovered judgment against this plaintiff in the court, in and for the county of in an action wherein the defendant was plaintiff and this plaintiff was defendant, for the sum of dollars.

II. That on the day of, 19.., the plaintiff was

compelled to pay and did pay to defendant the sum of dollars in satisfaction thereof.

III. That thereafter plaintiff duly appealed from said judgment to the court, and thereafter, on the day of, 19.., by the judgment of said last named court said first mentioned judgment was duly reversed; but that no part of the sum paid in satisfaction thereof has been repaid to this plaintiff.

WHEREFORE, etc.

652. For money received by factor for goods sold.

I. That on the day of, 19.., the plaintiff delivered to defendant, at his request, certain goods, the property of the plaintiff, described as follows [*describe goods*] to be sold by defendant upon commission.

II. That as plaintiff is informed and believes, the defendant thereafter and prior to the day of, 19.., sold said goods for the sum of dollars, which sum he thereupon received.

III. That, as plaintiff is informed and believes, the just charges of defendant for his commissions and expenses therein amount to dollars and no more.

IV. That on the day of, 19.., the plaintiff demanded of defendant payment of the balance of said price remaining after deducting said charges, but that no part of the same has been paid.

WHEREFORE, etc.

653. Against factor for goods sold on del credere commission.

I. That on the day of, 19.., the plaintiff delivered to defendant, at his request, certain goods and merchandise of the plaintiff, of the value of dollars, to sell upon commission, and defendant then promised to sell the same and to be responsible to plaintiff for the price thereof.

II. That as plaintiff is informed and believes, thereafter and on or before the day of, 19.., defendant sold said goods and merchandise for the sum of dollars, on a credit of months from the time of such sale; which credit expired before the commencement of this action, and no part of said sum has been paid to plaintiff.

III. [*As in Form 652.*]

IV. That on the day of, 19.., the plaintiff demanded payment from defendant of the balance of said pur-

chase price remaining after payment of said charges, but that no part of the same has been paid.

WHEREFORE, etc.

654. Against broker for proceeds of note discounted.

I. That on the day of, 19.., the plaintiff delivered to defendant to sell or procure to be discounted, a promissory note, the property of the plaintiff [*describe the note*], and thereupon defendant undertook to sell it or procure it to be discounted for a reasonable commission, and to pay the proceeds over to plaintiff.

II. That as plaintiff is informed and believes, on the day of, 19.., defendant procured said note to be discounted by one E.... F.... and received as the proceeds thereof the sum of dollars.

III. [*As in preceding form.*]

IV. That plaintiff, on the day of, 19.., duly demanded from defendant payment of the sum of dollars, being the balance of the proceeds after deducting his commission, but no part thereof has been paid.

WHEREFORE, etc.

CHAPTER XXIV.

COMPLAINTS FOR GOODS SOLD.

- | | |
|---|---|
| 655. Seller against buyer, to recover reasonable value. | 622. By assignee for price of stock, fixtures and good will of business, to be paid in instalments. |
| 656. The same, to recover agreed price. | 663. Against a fraudulent vendee. |
| 657. The same, delivery to a third person. | 664. Seller against buyer, alleging written contract. |
| 658. The same, avoiding defense of payment. | 665. The same, alleging partial performance and acceptance. |
| 659. The same, avoiding defense of unexpired credit. | 666. Seller against buyer, for goods sold on trial and not returned. |
| 660. The same, a married woman purchasing for benefit of her separate estate. | |
| 661. The same, for necessities furnished to wife or children. | |

655. Seller against buyer, to recover reasonable value.

I. That on the day of, 19.., at plaintiff sold and delivered to the defendant * certain goods, wares and merchandise consisting of [*here describe articles*] [a true and correct list of which articles so sold is attached hereto and marked Exhibit A].

II. That the same were reasonably worth the sum of dollars, no part of which sum has been paid [except, etc.].

WHEREFORE, etc.

[*For short form of complaint for goods sold, sustained in Minnesota see Solomon v. Vinson, 31 Minn. 205, 17 N. W. 340.*]

656. The same, to recover agreed price.

I. [*As in preceding form.*]

II. That defendant then promised to pay therefor the sum of dollars, [*if a credit was given add: on the day of, 19..*]

III. That on the day of, 19.., the plaintiff demanded of defendant payment of said sum.

IV. That no part has been paid [*except the sum of, etc., etc.*]

WHEREFORE, etc.

657. The same, delivery to a third person.

I. That on the day of, 19.., at plaintiff bargained and sold to defendant and delivered to one E....

F at the request of defendant, [*continue as in Form 655 from the **].

WHEREFORE, etc.

658. The same, avoiding defense of payment.

[*Allege sale, as in preceding forms.*]

III. That on the day of, 19.., at defendant passed to this plaintiff, as in payment of his indebtedness for said goods, the check of one G.... H.... upon the bank of which check defendant represented to this plaintiff to be good; but that on the contrary, said G.... H.... then had no funds at the said bank, and his said check was worthless, as the defendant then well knew [*or, was worthless, and although the same was duly presented for payment on the day of, 19.., it has never been paid, of which defendant had due notice*], and the plaintiff now brings said check into court for cancellation.

WHEREFORE, etc.

659. The same, avoiding defense of unexpired credit.

I. [*Allege sale on credit, as in preceding forms.*]

II. That in order to induce the plaintiff to allow him credit upon such sale, the defendant then falsely and fraudulently represented himself to the plaintiff to be worth a large sum, to-wit, ... dollars over and above all his just debts and liabilities; whereas in truth he was insolvent; and that the only credit given by the plaintiff to the defendant was solely induced by said false and fraudulent representations, and solely on the faith thereof.

WHEREFORE, etc.

660. The same, a married woman purchasing for benefit of her separate estate.¹

I. That between the day of, 19.., and the day of, 19.., at plaintiff furnished to defendant C.... D.... who was then and still is a married woman and the

¹ Under the enabling acts of most, if not all of the states covered by this work a married woman who has a separate estate or is carrying on a separate business may be sued alone upon all contracts entered into by her which are necessary or convenient for the enjoyment of her estate or the car-

rying on of her business. Minn. Rev. Laws 1905 sec. 4056; Iowa Code sec. 3162; N. Dak. Rev. Codes sec. 2767; S. Dak. Rev. Civ. C. sec. 105; Cobbe's Stats. of Nebr. sec. 5319.

Doubtless a complaint in the ordinary form, without statement of the fact that defendant is married

wife of one E.... F...., certain materials used for the building of a house for her upon and for the benefit of her own separate lands and premises, situated in the town of in the county of [or certain goods and merchandise to be used and which were in fact used by her in and about her separate business hereinafter described].

II. That said defendant, in consideration that the plaintiff would furnish such materials [or goods and merchandise] as aforesaid, then and there promised the plaintiff that she would pay for the same dollars [or, as much as they should be reasonably worth].

III. That such materials [or, goods and merchandise] so furnished were reasonably worth the sum of dollars, which sum became due to the plaintiff from her on the day of, 19.., but no part thereof has been paid [except the sum of, etc.]

IV. Plaintiff further shows, upon information and belief, that the premises above mentioned and hereinafter more particularly described, were at and before the day of, 19.., [which was the day of the marriage of defendants] since have been, and now are her sole and separate property, and the same are worth about dollars, and are bounded and described as follows [*description of premises*]; [or, that defendant at the time of such sale and delivery was the owner of a certain separate business, to-wit, a certain millinery business, and that the said goods and merchandise were purchased and used by her in the conduct and management of such separate business].

WHEREFORE, etc.

661. The same, for necessities furnished to wife or children.

I. That between the day of, 19.., and the day of, 19..; at plaintiff found and provided for one E.... F.... then the wife [or infant son, or infant daughter] of the defendant, at the request of said E.... F...., necessities for her use to-wit, [*describe same or refer to schedule attached*] of the value of dollars.

II. That on the day of, 19.., the plaintiff demanded payment therefor from defendant, but no part thereof has been paid.

WHEREFORE, etc.

would be entirely sufficient, leaving it to defendant to set up the coverture in the answer; but as the fact of coverture would very probably appear at an early stage of the trial, and would have to be

met by evidence showing that the contract is one upon which defendant may be sued alone, this form may be used if the pleader chooses, to meet the objection *in limine*.

662. By assignee for price of stock, fixtures and good will of business, to be paid in instalments.

I. That on the day of, 19.., one E.... F.... sold and delivered to defendant the stock and fixtures of a certain dry goods store in the property of said E.... F.... and bargained, sold and relinquished to defendant the good will of the business theretofore carried on by said E.... F.... there; for which defendant agreed to pay said E.... F.... the sum of dollars in equal quarterly payments on the days of the months of, ..., ... and thereafter.

II. That no part thereof has been paid [except the sum of, etc.]

III. That thereafter, and before this action, said E.... F.... duly assigned to this plaintiff the indebtedness of the defendant therefor, of which defendant had due notice.

WHEREFORE, etc.

663. Against a fraudulent vendee.

I. [*Allege sale, etc., as in Forms 655 or 656.*]

II. That in order to induce plaintiff to make said sale and delivery, and with intent to defraud him of said goods, defendant then falsely and fraudulently represented himself to the plaintiff to be worth a large sum, to-wit, ... dollars over and above all his just debts and liabilities, whereas in truth he was insolvent; and that induced by said false and fraudulent representations, and solely on the faith thereof, the plaintiff made said sale and delivery.

III. That thereafter, and with such intent, said defendant removed said goods to and is about to sell and dispose of the same.

IV. That defendant is insolvent and, as plaintiff is informed and believes, a judgment against him will be unavailing and worthless if he is suffered to sell and dispose of said goods.

WHEREFORE plaintiff demands judgment against said defendant for the sum of dollars, with interest thereon from the said day of, 19.., and that defendant and his agents be enjoined from selling, disposing of, removing, or in any wise interfering with said goods or any of them, until such judgment is fully satisfied.

664. Seller against buyer, alleging written contract.

I. That on the day of, 19.., the plaintiff and defendant entered into a contract or agreement in writing * in and by which defendant agreed to sell and deliver to plaintiff

500 cords of wood [*or otherwise describe the property sold*] in consideration whereof the defendant agreed to pay plaintiff upon the delivery of said wood the sum of dollars [*or insert after the * : of which a true copy, marked Exhibit A is annexed hereto and made a part of this complaint*].

II. That on or about the day of, 19.., plaintiff delivered said 500 cords of wood to defendant at

III. That no part of said sum of dollars has been paid to plaintiff [except the sum of dollars, paid the day of, 19..]

WHEREFORE, etc.

665. The same, alleging partial performance and acceptance.

I. [*As in last preceding form.*]

II. That on or about the day of, 19.., at plaintiff delivered to defendant 200 cords of said wood [*or otherwise describe the property delivered*] which said defendant then and there received as in full compliance and performance by the plaintiff of his said agreement of sale.

III. That the price of said wood so delivered by plaintiff according to the provisions of said contract is the sum of dollars [*or, that the reasonable value of said wood so delivered is the sum of dollars*]; that no part of the said sum has been paid [except the sum of dollars on the day of, 19..]

WHEREFORE, etc.

666. Seller against buyer, for goods sold on trial and not returned.

I. That on or about the day of, 19.., plaintiff delivered to defendant, at his special request [*describe goods delivered or refer to schedule annexed*] upon the agreement that said defendant would make trial of the same and if unsatisfactory return the same to plaintiff on or before the day of, 19.., and in case of failure to make such return to pay plaintiff therefor the sum of dollars [*or, the reasonable value thereof*].

II. That defendant did not return the said goods to plaintiff before the date last named, and has not returned the same, and that no part of said sum of dollars has been paid.

WHEREFORE, etc.

CHAPTER XXV.

COMPLAINTS FOR SERVICES.

- | | |
|--|---|
| 667. General form. | 684. For attorney's services and disbursements. |
| 668. The same, upon an account. | 685. For advertising agent for services and disbursements. |
| 669. For broker's commissions. | 686. On special contract, completely fulfilled. |
| 670. For freight, against consignor. | 687. On special contract fulfilled by assignee. |
| 671. For freight, against consignee. | 688. By public school teacher for salary (Wisconsin). |
| 672. For editing a newspaper. | 689. For salary by officer of a corporation. |
| 673. For editing a book. | 690. By servant for partial performance of entire contract. |
| 674. For services by architect. | 691. The same, where plaintiff was wrongfully discharged before expiration of the contract. |
| 675. For services by physician. | 692. Upon a building contract for services and materials. |
| 676. For services by undertaker. | |
| 677. For services by auctioneer. | |
| 678. For tuition services. | |
| 679. For stabling of horses. | |
| 680. For work and materials furnished. | |
| 681. For work and materials furnished on an account. | |
| 682. For services of minor child. | |
| 683. For board and lodging. | |

667. General form.

I. That between and including the day of, 19.., and the day of, 19.., plaintiff rendered services to defendant, at his request, as his household servant [*or state character of the services as in following forms.*]

II. That for said services defendant promised to pay him dollars, which sum became due therefor on the day of, 19..

III. That no part of the same has been paid, although plaintiff before this action demanded payment thereof.

WHEREFORE, etc.

668. The same, upon an account.

I. That the defendant is indebted to the plaintiff in the sum of dollars on an account for the work, labor and services rendered by plaintiff to defendant and at his request * at divers times between and including the day of, 19.., and the day of, 19.., a true copy of which account is hereto attached and marked Exhibit A.

II. [*If interest is demanded, allege as follows*]: That the said sum became due on the day of, 19.., and that payment thereof was demanded on said day, but that no part of the same has been paid.

WHEREFORE, etc.

669. For broker's commissions.

I. [*Proceed as in Form 668 to the **] as broker, in the purchase [*or sale, or both*] for defendant of stock, bonds and negotiable securities [*or of real estate in*] to the amount of dollars.

II. [*As in Form 668.*]

WHEREFORE, etc.

670. For freight, against consignor.

I. [*Proceed as in Form 668 to the **] in carrying in their vessel, the, from to 100 barrels of flour [*or, sundry goods and merchandise*] at the request of defendant.

II. [*As in Form 668.*]

WHEREFORE, etc.

671. For freight, against consignee.

I. [*Proceed as in Form 668 to the **] in carrying in their vessel, the, from to 100 barrels of flour [*or sundry goods and merchandise*] which were consigned to defendant, and by the plaintiff delivered to him, and by him accepted.

II. [*As in Form 668.*]

WHEREFORE, etc.

672. For editing a newspaper.

I. [*Proceed as in Form 668 to the **] as an editor, in conducting the newspaper of the defendants, known as "The E.... T...." and in writing and preparing articles and paragraphs for the same.

II. [*As in Form 668.*]

WHEREFORE, etc.

673. For editing a book.

I. [*Proceed as in Form 668 to the **] in compiling and editing a certain book entitled "The B.... C.... K...." and in preparing the same for the press, and revising and correcting the proofs of the same.

II. [*As in Form 668.*]

WHEREFORE, etc.

674. For services by architect.

I. [*Proceed as in Form 668 to the **] as architect, in forming and drawing plans, and making estimates for, and superintending the erection of a dwelling-house to be known as No., in street.

II. [*As in Form 668.*]

WHEREFORE, etc.

675. For services by physician.

I. [*Proceed as in Form 668 to the **] as a physician and surgeon in and about the treatment of defendant [*or of defendant's son, a member of his family*] for various diseases from which the defendant [*or his said son*] suffered, and for certain medicines and other articles provided by plaintiff in the course of such treatment; all of said services, medicines and other articles having been provided at the request of defendant; the said services, medicines and other articles being more particularly set forth in Exhibit A hereto annexed and made a part hereof.

II. [*As in Form 668.*]

WHEREFORE, etc.

676. For services by undertaker.

I. [*Proceed as in Form 668 to the **] as an undertaker in and about the conducting of the preparations for the burial, and the burial, of the deceased son of defendant, one E.... F...., the same being more particularly set forth in Exhibit A hereto annexed and made a part hereof.

II. [*As in Form 668.*]

WHEREFORE, etc.

677. For services by auctioneer.

I. [*Proceed as in Form 668 to the **] as an auctioneer in and about the selling by auction of certain household goods and property [*or otherwise describe the property sold*] for defendant, the said services being more particularly set forth in Exhibit A hereto annexed and made a part hereof.

II. [*As in Form 668.*]

WHEREFORE, etc.

678. For tuition services.

I. [*Proceed as in Form 668 to the **] in instructing the defendant's children in various useful branches of learning, and for books, papers and other necessary things furnished by this plaintiff in and about said work, at the like request [and for the

board, lodging and other necessities for said children, provided by plaintiff during said time, at the like request].

II. [*As in Form 668.*]

WHEREFORE, etc.

679. For stabling of horses.

I. [*Proceed as in Form 668 to the **] in the stabling, keeping and feeding of two certain horses, the property of defendant, as more particularly set forth in Exhibit A hereto attached and made a part hereof.

II. [*As in Form 668.*]

WHEREFORE, etc.

680. For work and materials furnished.

I. [*Proceed as in Form 668 to the **] in the printing of 1,000 copies of a book called "The B.... C.... K...." [*or otherwise state the nature of the services*] and that plaintiff then and there furnished the paper and other materials necessary in the said work upon the like request, and that he delivered the same to defendant.

II. [*As in Form 668.*]

WHEREFORE, etc.

681. For work and materials furnished on an account.

I. [*Proceed as in Form 668 to the **] in painting the house of defendant in said town [*or in making a carriage for defendant, or in repairing the machinery in the mill of defendant in said town*] and for materials and other necessary things furnished by this plaintiff in and about said work, on the like request, as more particularly set forth in Exhibit A hereto attached and made a part hereof.

II. [*As in Form 668.*]

WHEREFORE, etc.

682. For services of minor child.

I. That one E.... F.... rendered services to the defendant, at his request, as a clerk in his store at from, 19.., until, 19..

II. That such services were reasonably worth the sum of dollars [*or allege price agreed, as in Form 667.*]

III. That the said E.... F.... is the son of defendant, and was then, and is now under twenty-one years of age.

IV. That no part of the said sum has been paid.

WHEREFORE, etc.

683. For board and lodging.

I. That between the day of, 19.., and the day of, 19.., defendant used and occupied as his lodgings certain rooms in the dwelling house of the plaintiff known as No., ... street, in the city of by the permission of plaintiff, and was also furnished by the plaintiff with food, attendance and other necessities at defendant's request, for all of which defendant promised to pay the plaintiff dollars per week [or per month, or if no contract was agreed upon], all of which were reasonably worth the sum of dollars per week [or per month].

II. That the amount now due from defendant to plaintiff on account of the said board and lodging so furnished is the sum of dollars; that no part thereof has been paid [except, etc.] although the plaintiff made due demand for the payment thereof prior to the commencement of this action.

WHEREFORE, etc.

684. For attorney's services and disbursements.

I. That plaintiff is and was at the times hereinafter stated an attorney and counselor at law, practicing his profession at and that defendant is indebted to the plaintiff in the sum of dollars, upon an account for the services of the plaintiff as the attorney of the defendant, rendered upon his retainer, between the day of, 19.., and the day of, 19.., in prosecuting and defending certain suits; and for like services at his request in drawing, copying and engrossing various instruments in writing, and in counseling and advising him, the defendant, and for divers journeys and other attendances in and about the business of said defendant [*according to the facts*] at his request; and for money paid out and expended by this plaintiff for defendant, at his request, and in and about said suits and business, a true copy of which account is hereto attached and marked Exhibit A. That said sum became due and payable, from the defendant to the plaintiff, on the day of, 19..

II. That on said day [or on the day of, 19.., at] payment of same was duly demanded from the defendant by this plaintiff, but no part thereof has been paid [except the sum of, etc.]

WHEREFORE, etc.

685. For advertising agent for services and disbursements.

I. That between the day of, 19.., and the day of, 19.., at this plaintiff rendered services

to the defendants, at their request, in causing the defendants' advertisements of their business to be inserted in the following named newspapers and periodicals [*names of papers, or annex and refer to a list*].

II. That this plaintiff, for such insertions, for the use of the defendants, and at their request, paid out [and incurred liability to pay] the sum of dollars, the amount of which payments, together with a reasonable sum for said services the defendants promised to pay this plaintiff.

III. That such services were reasonably worth the sum of dollars, which sum, with the amount of said disbursements, became due on the day of, 19.., but no part thereof has been paid [except the sum of dollars].

WHEREFORE, etc.

686. On special contract, completely fulfilled.

I. That on the day of, 19.., the defendants [in consideration of] executed in writing under their hands and seals [and delivered to the plaintiff] a contract with the plaintiff, of which the following is a copy: [*copy of contract*].

II. That thereafter, and before the day of, 19.., plaintiff duly performed all the conditions thereof on his part.

III. That on the day of 19.., at plaintiff duly demanded of defendants payment of the sum of dollars [*being the last installment*], in said contract mentioned.

IV. That no part of the same has been paid [except, etc.]

WHEREFORE, etc.

687. On special contract fulfilled by assignee.

I. That on the day of, 19.., at defendants, in consideration of dollars executed in writing under their hands and seals, and delivered a contract with one M.... N.... of which the following is a copy [*or of which a copy is hereto annexed and marked Exhibit A*].

II. That thereafter and before the day of, 19.., said M.... N.... duly assigned the same, and all his rights under it to the plaintiff.

III. That up to the time of the assignment, the assignor had duly performed all the conditions of the contract on his part, and that since said assignment plaintiff duly performed all the conditions thereof on his part.

[*Continue as in last preceding form from III down.*]

688. By public school teacher for salary (Wisconsin).

I. That at the times hereinafter mentioned defendant was and still is a school district lawfully organized under the laws of this state, and plaintiff was and still is a duly qualified public school teacher holding a teacher's certificate authorizing him to teach in the public schools of the county of [*or that the plaintiff's certificate is limited to a district less than a county, setting forth the district*].¹

II. That on or about the day of, 19.., the district board of defendant district, at a regularly called meeting, made and entered into a contract with the plaintiff whereby plaintiff contracted to teach the public school of said district for the term of months commencing on the day of, 19.., for the sum of dollars per week [month or year] to be paid by said district, a copy of which contract is hereto attached and made a part hereof, marked Exhibit A, and that the said contract, together with a copy of plaintiff's certificate as teacher attached thereto was thereupon filed with the clerk of said district.²

III. That thereupon plaintiff commenced to teach the said school, and continued to teach the same for a period of months, and performed all of the conditions of said contract on his part to be performed.

IV. That no payments have been made by defendant upon said contract [except the sum of, etc.] although the plaintiff has prior to the commencement of this action made due demand upon defendant for such payment, and that there is now due from defendant to plaintiff for said service so rendered the sum of dollars, with interest from the day of, 19..

WHEREFORE, etc

689. For salary by officer of a corporation.

I. That the defendant was at the times hereinafter stated and still is a private corporation organized and existing under the laws of this state.

II. That on or about the day of, 19.., plaintiff was duly elected to the office of secretary [*or president, as the fact may be*] of said defendant corporation, and from the said

¹ A person not holding a certificate or diploma authorizing him to teach cannot enter into a valid contract with a school district. Wis. Stats. 1898 sec. 438.

² No act of the district board is

valid unless voted at a meeting of the board duly called, or a meeting where all members are present. Wis. Stats. 1898 sec. 432 as amended by Laws 1905 c. 421.

last named date until the day of, 19.., the plaintiff performed all the duties pertaining to the said office.

III. That the salary of the said office prior to said time had been and was duly fixed by the said defendant at the sum of dollars per year and remained so fixed during all of the time defendant held said office.

IV. That no part of the said salary has been paid [except, etc.] and that by reason of the premises defendant is justly indebted to the plaintiff in the sum of dollars, payment of which sum has been duly demanded by plaintiff before the commencement of this action.

WHEREFORE, etc.

690. By servant for partial performance of entire contract.³

I. That on or about the day of, 19.., defendant employed plaintiff as a farm laborer [*or otherwise describe the nature of the employment*] for the full term of ten months commencing March 1st, 19.., and agreed to pay plaintiff for his services during said entire period the sum of dollars per month, payable at the end of each month.

II. That thereupon plaintiff entered upon his said employment, and continued therein until the day of, 19.., when by mutual consent the plaintiff left the service of said defendant.

III. That no part of the said wages so agreed to be paid by defendant has been paid [except, etc.], although plaintiff has demanded the same before the commencement of the action, and that the sum of dollars, with interest from, 19.., is now due plaintiff on said contract.

WHEREFORE, etc.

691. The same, where plaintiff was wrongfully discharged before expiration of the contract.⁴

I. [*As in preceding form.*]

II. That thereupon plaintiff entered upon said employment and continued therein until the day of, 19.., at which time defendant without just or reasonable cause dis-

³ If an entire contract be terminated by consent of the parties after part performance only, plaintiff can recover at the contract rate for that part of the contract which he has completed. *Hildebrand v. American Fine Art Company*, 109 Wis. 171.

⁴ If a party to an entire contract is wrongfully prevented from rendering full performance he can

recover on the contract for services rendered prior to such prevention, together with damages for not being allowed to complete the contract, not exceeding the full amount he could have earned by full performance, which amount *prima facie* is the full wages for the balance of the contract period less any sum which might reasonably have been earned during such

charged plaintiff and refused to permit him to continue in said employment although the plaintiff was ready and willing to do so.

III. That thereafter and from time to time plaintiff made due and diligent effort to obtain other employment during the said contract period, but was unable to secure such employment, whereby plaintiff has lost the wages which he otherwise would have received from defendant during said period [*or if plaintiff secured employment during any part of said period, state for what term and how much was received*].

IV. That defendant has neglected and refused to pay to the plaintiff the wages earned by plaintiff during the time he was actually employed by defendant [except, etc.] and that defendant has also neglected and refused to pay the plaintiff for any part of the damages caused to plaintiff by reason of said unlawful discharge, although plaintiff prior to the commencement of this action demanded payment of the same from defendant; and that there is now due the plaintiff from the defendant by reason of the premises the sum of dollars, with interest from, 19..

WHEREFORE, etc.

692. Upon a building contract for services and materials.⁵

I. That on or about the day of, 19.., plaintiff and defendant entered into a contract in writing by which the plaintiff agreed to erect and furnish materials for the erection of a certain building for defendant to be used as a dwelling house, for the sum of dollars, a copy of which contract is attached to this complaint and made a part hereof and marked Exhibit A.

II. That thereafter plaintiff proceeded to construct the said building, and furnished materials therefor, and prior to the day of, 19.., duly performed all the conditions of said contract on his part to be performed, and completed said building, and the same was duly accepted by defendant.

III. That defendant has paid, on account of the said contract, at various times, the sum of dollars, leaving a balance of dollars now due and owing to plaintiff, and that no part thereof has been paid, although the same has been demanded by plaintiff prior to the commencement of this action.

WHEREFORE, etc.

time. *Hildebrand v. American Fine Art Company*, 109 Wis. 171 s.c. 85 N. W. 268.

⁵As nearly all actions upon building contracts are brought in

the form of foreclosure of mechanic's lien, no further forms are inserted here, but additional forms will be found in Chapter LXVIII.

CHAPTER XXVI.

COMPLAINTS FOR USE AND OCCUPATION OF REAL PROPERTY.

693. For reasonable value of use.

694. For agreed rent.

695. For rooms and lodgings.

693. For reasonable value of use.

I. That plaintiff is now and was at the times hereinafter named, the owner in fee of that certain dwelling house and premises known as No., ... street, in the city of [*or otherwise describe the premises*] and that defendant occupied the same by permission of the plaintiff, as his tenant, from the day of, 19.., until the day of, 19..

II. That the use of the said premises for that period was reasonably worth dollars.

III. That no part of the same has been paid [except the sum of, etc.]

WHEREFORE, etc.

694. For agreed rent.

I. [*Allege ownership as in preceding form, and then proceed*]: That on the day of, 19.., at defendant hired from plaintiff the said premises for the term of at the agreed rental of dollars per month, payable on the first day of every month.

II. That defendant occupied the said premises from the day of, 19.., to the day of, 19.. [*Or, where defendant had abandoned possession: That defendant took possession of and occupied the said premises under said agreement*].

III. That the sum of dollars, being the part of said rent due on the first day of, 19.., is still unpaid.

WHEREFORE, etc.

695. For rooms and lodgings.

[*Proceed as in Forms 693 or 694 substituting as a description of the property rented*]: rooms in and part of the house of the plaintiff [*and if furnished, add: together with furniture, linen, and other household necessities of the plaintiff, which were therein*], by the plaintiff's permission as his tenant, from, etc.

CHAPTER XXVII.

COMPLAINTS FOR HIRE OF PERSONAL PROPERTY.

696. For the hire of personal property.	damages for failure to return.
697. For hire of property with	698. For hire of property with damages for ill use.

696. For the hire of personal property.

I. That between the day of, 19.., and the day of, 19.., defendant hired from plaintiff a certain horse and carriage, the property of the plaintiff [*or otherwise describe the property hired*] for which he agreed to pay plaintiff the sum of dollars, on the day of, 19.., [*or the reasonable value of the use thereof, which was and is the sum of dollars*].

II. That no part of the same has been paid [except the sum of, etc.]

WHEREFORE, etc.

697. For hire of property with damages for failure to return.

First. For a first cause of action:

I. That on the day of, 19.., at defendant hired from plaintiff one pianoforte [*or otherwise describe the property*] the property of the plaintiff, for the space of six months then next ensuing, to be returned to this plaintiff at the expiration of said time in good condition, reasonable wear excepted, for the use of which he promised to pay this plaintiff a reasonable sum [*or if a specified sum was agreed to be paid insert amount thereof*].

II. That dollars was a reasonable sum for the hire of the same; which sum, on the day of, 19.., became due from defendant to plaintiff.

III. That no part of the same has been paid [except the sum of dollars].

Second. And for a second cause of action:

I. Plaintiff further states that the value of the property so hired by defendant, as above alleged, was dollars, and that defendant, not regarding his said undertaking to return the same to this plaintiff, has not returned the same, although he

was, on the day of, 19.., at requested by the plaintiff so to do, to the damage of the plaintiff dollars.

WHEREFORE, etc.

698. For hire of property with damages for ill use.

First. For a first cause of action:

I. That on the day of, 19.., at defendant hired from the plaintiff household furniture, plate, pictures, and books, the property of plaintiff, to-wit [*describe the articles, or refer to a schedule annexed*], for the space of years then next ensuing, to be returned by him to the plaintiff at the expiration of said time in good condition, reasonable wear and tear thereof excepted.

II. That he promised to pay plaintiff for the use thereof dollars [in quarterly payments, on the days of, ..., ... and thereafter].

III. That no part thereof has been paid [except the sum of dollars, etc.]

Second. For a second cause of action:

I. This plaintiff further states that the value of the property so hired by defendant, as above alleged, was dollars.

II. That defendant, not regarding the said undertaking to return the same in good condition, took so little care thereof that through his negligence, carelessness and ill-use the same became broken, defaced and damaged beyond the reasonable wear thereof, and in that condition were returned to plaintiff, to his damage dollars.

WHEREFORE, etc.

CHAPTER XXVIII.

COMPLAINTS UPON ACCOUNTS AND AWARDS.

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|---|--|
| 699. Common form upon open account. | under common law agreement of arbitration. |
| 700. Upon account stated. | 703. Upon award of an umpire. |
| 701. On an account stated between partners. | 704. Allegation of enlargement of time. |
| 702. Upon award of arbitrators, | |

699. Common form upon open account.¹

I. That defendant is indebted to plaintiff in the sum of dollars, upon an account for [*here state the consideration, e. g. goods sold and money lent by plaintiff to defendant*] between the day of, 19.., and the day of, 19.., a true copy of which account is attached to and made part of this complaint and marked Exhibit A.

II. That the sum of dollars became payable thereon on the day of, 19.., but no part thereof has been paid.

WHEREFORE, etc.

700. Upon account stated.

I. That on the day of, 19.., at an account was stated between plaintiff and defendant, upon which a balance of dollars was found to be due from said defendant to this plaintiff [which sum defendant then agreed to pay].

II. That no part thereof has been paid [except, etc.]

WHEREFORE, etc.

701. On an account stated between partners.

I. That on the day of, 19.., the plaintiff formed a partnership for the purpose of [*state business*] at

¹ Under the statutes of Iowa and Nebraska a copy of the account must be attached to and filed with the petition (Iowa Code sec. 3623, 3624; Cobbey's Ann. Stats. of Nebr. sec. 1124). In Wisconsin, Minnesota, North Dakota and South Dakota it is not necessary to set forth the items of account,

but if it be not set forth in the pleading a verified copy may be demanded of the adverse party. (Wis. Stats. 1898 sec. 2672; Minn. Rev. Laws 1905 sec. 4151; N. Dak. Rev. Codes sec. 5282; S. Dak. Rev. Code C. P. sec. 135). It would seem best, therefore, to attach copy to original complaint.

..... [for a term of years] [*or set forth copy of agreement*].

II. That the capital of said partnership was paid in and the said firm commenced business on said date and conducted the same until the day of, 19.., when a full accounting and settlement of the said partnership affairs was had between plaintiff and defendant.

III. That upon such accounting and settlement it was ascertained and determined that the defendant was indebted to the plaintiff in the sum of dollars, and the said business was by mutual consent discontinued and said partnership dissolved.

IV. That the debts of said partnership have been paid in full, and that on the day of, 19.., the plaintiff demanded of defendant payment of said sum of dollars, but the defendant refused and still refuses to pay the same.

WHEREFORE, etc.

702. Upon award of arbitrators, under common law agreement of arbitration.²

I. That on the day of, 19.., controversies existed between plaintiff and defendant concerning certain demands by the plaintiff against said defendant for services rendered by this plaintiff to said defendant, at his request, in drawing plans and specifications of a dwelling house for defendant, which demands defendant disputed and refused to pay [*or state other claims, according to the circumstances of the case*].

II. That for the purpose of putting an end to said controversies and differences, they then and there [by an agreement in writing] submitted themselves and said controversies to the award, arbitrament and final determination of one E.... F...., an arbitrator [*or E.... F.... and G.... H.... two arbitrators*] to arbitrate and determine concerning said disputes and controversies, and mutually promised each other to abide by and perform his award [*or they then and there, by an agreement in writing, a copy of which is hereto annexed and marked Exhibit A agreed to submit the same to the award of E.... F....*]

III. That thereafter the said arbitrator [*or the said arbitrators*] having undertaken the arbitration, heard plaintiff and de-

²This and the two following forms are used in case of an action brought upon a common law arbitration, and have no reference to the proceedings which the statute authorizes to be taken before the

entry of judgment upon a statutory arbitration; appropriate forms for which proceedings are found in Chapter III, *supra*. See note to that chapter.

fendant, and on the day of, 19.., at duly made and published [*and where such notice is required by the submission, add:* and notified the said parties of] his [*or their*] award [*in writing*] of and concerning the matter so referred [*which award bears date the .. .day of, 19..*]; and thereby he awarded and declared that after due appearance before him on behalf of this plaintiff and said defendant he found that said defendant was justly indebted to this plaintiff in the sum of dollars for the services aforesaid [*or otherwise state substance of the award*].

[*Or, where the award is in writing*]: That thereafter said arbitrator [*or arbitrators*] having undertaken the arbitration, duly made and published his [*or their*] award in writing, of which the following is a copy [*or a copy of which is hereto annexed and marked Exhibit B*].

IV. That plaintiff duly performed all the conditions thereof on his part and [afterwards, and on or about the day of, 19.., at] gave notice of said award to the defendant, and demanded of him payment of said sum of dollars.

V. That defendant then and ever since has refused to pay the same and there is now due from defendant to plaintiff thereon the sum of dollars, with interest from, etc.

WHEREFORE, etc.

703. Upon award of an umpire.

[*Substitute for the first part of paragraph III in Form 702*]: That said E.... F.... and G.... H.... [arbitrators], before they proceeded upon the said arbitration, on the day of, 19.., by writing, under their hands, appointed one J.... K.... to be umpire in the matter so submitted; and the said arbitrators, after hearing the plaintiff and defendant, and not being agreed concerning the matters submitted, the said J.... K.... afterwards undertook said arbitration and heard plaintiff and defendant, and on the day of, 19.. [*allege the award as in Form 702*].

704. Allegation of enlargement of time.

That on the day of, 19.. [*or thereafter, and within the time limited for making the award*] plaintiff and defendant, by agreement [*in writing, of which a copy is hereto annexed and marked Exhibit C*] extended the time for making the award until the day of, 19..

CHAPTER XXIX.

COMPLAINTS ON VARIOUS EXPRESS PROMISES.

- | | |
|---|---|
| <p>705. Upon an agreement to pay money in consideration of the withdrawal of a pending action.</p> <p>706. The same, for withdrawal of opposition to probate of a will.</p> <p>707. Upon a promise to a third person to pay money to the plaintiff.</p> <p>708. Upon a promise to pay for the surrender of a lease.</p> | <p>709. To recover the consideration for a conveyance.</p> <p>710. On express promise in consideration of a precedent debt.</p> <p>711. On a new promise to pay a debt barred by statute of limitations.</p> <p>712. On a promise to pay share of net profits for assignment of a patent.</p> |
|---|---|

705. Upon an agreement to pay money in consideration of the withdrawal of a pending action.

I. That on the . . . day of . . . , 19 . . , an action was pending between the parties to this action, brought by the plaintiff to recover from defendant the sum of dollars, which defendant owed plaintiff, but which he disputed.

II. That in consideration that the plaintiff would discontinue his said action and would accept dollars in satisfaction of said disputed claim, defendant promised to pay plaintiff the sum of dollars [on the . . . day of . . . , 19 . .]

III. That plaintiff accordingly did discontinue said action. [*Or:* That plaintiff has duly performed all the conditions thereof on his part].

IV. That no part of said sum has been paid [except the sum of, etc.]

WHEREFORE, etc.

706. The same, for withdrawal of opposition to probate of a will.

I. That heretofore one M . . . N . . . died, leaving him surviving A . . . B . . . , this plaintiff, one of his heirs at law [*or* next of kin].

II. That after his death the defendant [and others] produced and propounded for probate in the court of the surrogate of an instrument purporting to be the will of said M . . .

N...., whereby [a part of] the estate to which the plaintiff would have succeeded if said M.... N.... had died intestate was devised and bequeathed to the defendant.

III. That there were doubts as to the validity of said devises and bequests [*or of the execution of said will, or both*] and that the plaintiff threatened to oppose its probate on that account.

IV. That in consideration that the plaintiff would withhold all opposition to the proving of the will, the defendant, on the day of, 19.., promised that he would pay to the plaintiff the sum of dollars [on, etc.]

V. That plaintiff accordingly withdrew all opposition to the probate of the will, and it was thereupon duly proved before said surrogate. [*Or: That plaintiff has duly performed all the conditions thereof on his part*].

VI. That no part of said sum has been paid [except the sum of, etc.]

WHEREFORE, etc.

707. Upon a promise to a third person to pay money to the plaintiff.

I. That on the day of, 19.., one M.... N.... was and ever since has been indebted to the plaintiffs in the sum of dollars.

II. That on that day the said M.... N.... being the holder of a bill of exchange [*describing it*] indorsed and delivered the same to the defendants, in consideration of which the defendants then and there promised M.... N.... that they would endeavor to collect the same, and that when collected they would apply the proceeds in payment of said indebtedness of said M.... N.... to the plaintiffs.

III. That thereafter and on the day of, 19.., the defendants collected and received the amount thereof.

IV. That no part of the same has been paid to the plaintiff.

WHEREFORE, etc.

708. Upon a promise to pay for the surrender of a lease.

I. That at the time hereafter mentioned the plaintiff had a lease of a house and lot in the town of for a term commencing on the day of, 19.., and ending on the day of, 19.., under which he was entitled to the possession of said house and lot.

II. That on the day of, 19.., the defendant being the owner of [*or having purchased*] the reversion of said premises, subject to the unexpired term of the lease, promised the plaintiff that in consideration that he, the plaintiff, would

surrender to the defendant the unexpired term and the possession, he would pay the plaintiff the sum of dollars [on, etc.]

III. That the plaintiff thereupon accordingly surrendered the unexpired term and the possession to the defendant. [Or: That the plaintiff duly performed all the conditions thereof on his part].

IV. That no part of said sum has been paid [except the sum of, etc.]

WHEREFORE, etc.

709. To recover the consideration for a conveyance.

I. That on the day of, 19.., at this plaintiff sold and conveyed to defendant, at his request, certain premises in the town of known and described as follows [*designate the premises*].

II. That defendant agreed to pay plaintiff therefor the sum of dollars, on the day of, 19..

III. That no part of the same has been paid [except the sum of, etc.]

WHEREFORE, etc.

710. On express promise in consideration of a precedent debt.

I. That on the day of, 19.., at the defendant being then indebted to the plaintiff in the sum of dollars for [*here state concisely the consideration, e. g. goods heretofore sold and delivered by the plaintiff to the defendant*] in consideration thereof promised the plaintiff that he would pay him said sum on the day of, 19.. [*or on demand, or otherwise, as the case may be*].

II. That no part thereof has been paid [except the sum of, etc.]

WHEREFORE, etc.

711. On a new promise to pay a debt barred by statute of limitations.¹

[*Plead the original cause of action as in other cases, and continue*]:

II. That thereafter, on the day of, 19.., in con-

¹ In those states where, as in Wisconsin, the defense of the statute of limitations is taken advantage of upon demurrer, it is necessary to allege in the complaint

the new promise substantially as in this form, if it appears on the face of the complaint that the original cause of action expired by the statute of limitations.

sideration of the foregoing facts, the defendant promised to the plaintiff that he would pay such indebtedness.

III. That no part of the same has been paid [except the sum of, etc.]

WHEREFORE, etc.

712. On a promise to pay share of net profits for assignment of a patent.²

I. That heretofore there were issued in due form of law unto this plaintiff by the United States of America letters patent, as follows: [*specify the patents if more than one by numbers and date of issue*] and that the said letters patent are the same letters patent as are named in the contract duly made between the parties hereto a copy of which is hereunto annexed and made part hereof.

II. That thereafter and by virtue of said contract this plaintiff on or about the day of, 19.., duly assigned and set over unto the defendant at its request the letters patent aforesaid.

III. That thereafter and ever since the last named date the defendant, as the plaintiff is informed and believes, has manufactured and sold under said letters patent and contract upwards of of the commodities thereby covered and referred to, and that after all the deductions authorized by said contract from the proceeds of such sale there remains received by the defendant as net profits the sum of at least dollars.

IV. That plaintiff has performed all the conditions and agreements by him to be kept and performed under said contract on his part, and prior to the commencement of this action demanded his said half of the said net profits from the defendant, but the defendant refused to pay over the same or account therefor, to the plaintiff's damage dollars.

WHEREFORE, etc.

² Precedent in *Dalzell v. F. W. C. Co.*, 138 N. Y. 285.

CHAPTER XXX.

COMPLAINTS ON BONDS.

- | | |
|---|---|
| 713. On bond for payment of money only. | 719. The same, pleading legal effect. |
| 714. The same, setting forth copy. | 720. On a bond for the fidelity of a clerk, or cashier. |
| 715. By surviving obligee in a joint bond. | 721. On a bond for faithful accounting of a subscription agent. |
| 716. On a negotiable corporate bond. | 722. On arbitration bond for refusal to comply with award. |
| 717. On a coupon. | |
| 718. On a bond other than for payment of money. | |

713. On bond for payment of money only.

I. That on the day of, 19.., at the defendant covenanted with the plaintiff, under his hand and seal, to pay to the plaintiff the sum of [*state, not the penalty, but the amount named in the condition*] on the day of, 19.., with interest from, etc. [*or as follows: dollars thereof on the day of, 19.., and dollars thereof on the day of, 19.., with interest on each of said sums from, etc., or otherwise, according to the condition*].

II. That no part of the same has been paid [except the sum of, etc.]

WHEREFORE the plaintiff demands judgment against the defendant for the sum of [*state the amount due*].

714. The same, setting forth copy.

I. That on the day of, 19.., the defendant made and delivered to the plaintiff his certain bond, a copy of which is hereunto attached, marked Exhibit A and made a part of this complaint. [*Continue as in Form 713.*]

WHEREFORE, etc.

715. By surviving obligee in a joint bond.

I. That on the day of, 19.., at the defendant covenanted with the plaintiff and one C.... D.... under his hand and seal, to pay to the plaintiff and said C.... D.... jointly [*proceed as in other forms*].

II. That on the day of, at, said C.... D.... died.

III. [*Allege breach as in other cases.*]

WHEREFORE, etc.

716. On a negotiable corporate bond.

I. That the defendant is now and was at the times herein-after mentioned a corporation organized and existing under the laws of the state of

II. That on the day of, 19.., said defendant by its proper agents and officers executed its negotiable commercial bond, bearing date on said day, in the sum of dollars, payable to bearer [*or to A.... B.... or order, or to A.... B.... or his assigns*] years after date, at the bank, in the city of, a copy of which bond is hereto attached and made part of this complaint and marked Exhibit A.

III. That thereafter and before the maturity of said bond plaintiff purchased the same for a valuable consideration, and is still the owner thereof.

IV. That no part of said bond has been paid, but there is due thereon from defendant to plaintiff the said sum of dollars, with interest thereon from the day of, 19..

WHEREFORE, etc.

717. On a coupon.

I. That on the day of, 19.., at the city of said defendant made, issued and delivered its certain coupon, numbered whereby it promised to pay to bearer the sum of dollars on the day of, 19..

II. That plaintiff is now the lawful owner and holder thereof, and that no part thereof has been paid.

WHEREFORE, etc.

718. On a bond other than for payment of money.

I. That the defendant, on the day of, 19.., made and delivered his bond or writing obligatory sealed with his seal, of which the following is a copy: [*set forth copy of bond, including condition*] [*or of which a copy is attached hereto, made part of this complaint and marked Exhibit A*].

II. [*Set forth a breach and allege damage.*]

WHEREFORE, etc.

719. The same, pleading legal effect.

I. That on the day of, 19.., at the defendant covenanted with the plaintiff, under his hand and seal, to pay to the plaintiff the sum of [*state the penalty*].

II. That said obligation was upon the express condition thereunder written that if, etc. [*set forth the substance or words of the condition*] the said obligation was to be void, otherwise to remain in full force.

III. [*Allege breaches, as in other cases.*]

WHEREFORE, etc.

720. On a bond for the fidelity of a clerk, or cashier.

I. That on the day of, 19.., at, the plaintiffs being then about to employ one M.... N.... as a clerk [*or to appoint one M.... N.... as their cashier*] the defendants under their hands and seals, covenanted with the plaintiffs that if the said M.... N.... should not faithfully perform his duties as such clerk [*or cashier*] to the plaintiffs, or should fail to account to the plaintiffs for all moneys, evidences of debt, or other property received by him for the use of the plaintiffs, the defendants would pay to the plaintiffs whatever loss they might sustain by reason thereof, not exceeding dollars [*or otherwise, according to the condition; or say: That on the day of, 19.., at the plaintiffs being then about to employ one M.... N.... as a clerk [or to appoint one M.... N.... as their cashier] the defendants executed to the plaintiffs a bond, a copy of which is annexed and marked Exhibit A*].

II. That between the day of 19.., and the day of, 19.., the said M.... N.... as such clerk [*or cashier*] received money and other property amounting to the value of dollars, to the use of the plaintiffs, which he has converted to his own use and for which he has not accounted to them, although an account thereof has been duly demanded. [*Or otherwise set forth breach according to the fact.*]

WHEREFORE, etc.

721. On a bond for faithful accounting of a subscription agent.

I. That on the day of, 19.., at it was mutually agreed between the plaintiff and one E.... F.... that the said E.... F.... should canvass the cities of for subscribers to certain books then in course of publication in numbers by the plaintiff, and had for sale by him to subscribers [*or for subscribers to the, a magazine or periodical then published by this plaintiff*]; that the said E.... F.... should collect for account of the plaintiff the moneys which should grow due upon the subscriptions procured by him; that the plaintiff should pay to said E.... F...., ... dollars upon each order or subscription obtained by him the same to be payable

whenever numbers of the work subscribed for should have been paid for by the subscriber thereof; and that the said E.... F.... should faithfully account to this plaintiff for all books and parts of books intrusted to him and should faithfully pay over to the plaintiff all the money that he should from time to time collect under the authority given him by the said agreement, exceeding his commission of dollars for each order or subscription.

II. That then and there [*or on the day of, 19.., at*] the defendant made and delivered to the plaintiff his bond under his hand and seal, and thereby bound himself in the penal sum of dollars to this plaintiff, the condition of which bond was that if the said E.... F.... should faithfully render up or account for, to this plaintiff, all books and parts of books and other publications and specimens, and all sums of money, evidences of debt and things in action which should be intrusted to him by or on behalf of this plaintiff, or by or on behalf of others to the use of this plaintiff, in the course of the employment of said E.... F.... as a canvasser as aforesaid, up to and not exceeding the amount of dollars at any one time, then said bond should be void, otherwise it should be of full force and effect.

III. That the plaintiff did thereafter intrust and deliver to said E.... F.... in the course of his employment under the agreement aforesaid certain books and parts of books of the value of dollars, for which he has failed to account to the plaintiff [*or that thereafter said E.... F.... did collect and receive divers sums of money in the course of his employment under the agreement aforesaid, exceeding his commissions, to-wit, the amount of dollars, which sums he failed to render up, account for or pay over to the plaintiff*].

IV. That on the day of, 19.., at the said E.... F.... was duly requested to account to this plaintiff for said books and parts of books [*or to account for and pay over to this plaintiff such sums*] but he has not done so, of which this plaintiff gave due notice to the defendant, and thereupon demanded payment from him of the said sum of dollars, according to the terms of said bond, but the same has not been paid, nor any part thereof.

WHEREFORE, etc.

722. On arbitration bond for refusal to comply with award.

I. That certain differences having arisen between the plaintiff and the defendant, in consideration thereof and in consideration of a like bond executed by this plaintiff to the defendant, the

defendant heretofore made and delivered to the plaintiff a bond of arbitration, conditioned to abide the award of M.... N.... upon said differences, of which bond a copy is hereto annexed as a part of this complaint and marked Exhibit A.

[II. That on the day of, 19.., or thereafter, and within the time limited for making the award, by agreement of plaintiff and the defendant the time of the making of the award was extended to the day of, 19..]

III. That the said arbitrator, having undertaken the arbitration on the day of, 19.., duly made and published his award in writing upon the matter submitted, ready to be delivered to the parties, or to such of them as should desire the same, and thereby awarded that the defendant should [*here indicate briefly the provision which the defendant has disregarded*]; of which award a copy is hereto annexed, made part of this complaint and marked Exhibit B.

IV. That the plaintiff duly performed all the conditions of said bond on his part [and on the day of, 19.., gave notice of said award to the defendant and tendered to him, etc., and demanded of him, etc., etc.]

V. That the defendant has not [*here allege breach, specifying the particular act or omission*].

WHEREFORE, etc.

CHAPTER XXXI.

COMPLAINTS ON OFFICIAL BONDS AND BONDS AND UNDERTAKINGS GIVEN IN SUIT.

- | | |
|---|---|
| <p>723. Complaint by municipality on bond of public officer.</p> <p>724. Assignment of breach of bond of municipal treasurer.</p> <p>725. Assignment for breach of sheriff's bond for neglect to levy.</p> <p>726. The same, for neglect to sell after levy.</p> <p>727. The same, for neglect to return.</p> <p>728. The same, for neglect to pay over moneys collected.</p> <p>729. Allegation of judgment against sheriff for breach.</p> <p>730. Complaint by creditor on administration bond (Wisconsin).</p> <p>731. Complaint by heir at law upon administration bond (Wisconsin).</p> <p>732. By administrator <i>de bonis non</i> on bond of former administrator, alleging mal-administration (Wisconsin).</p> <p>733. By legatee on executor's bond (Wisconsin).</p> <p>734. Complaint by county judge on bond of executor or administrator, for benefit of all parties (Wisconsin).</p> | <p>735. By heir on administration bond, general form, where leave to sue is not required.</p> <p>736. Allegation of conversion, and refusal to account for assets.</p> <p>737. Complaint on undertaking for the prosecution of an action; short form, where undertaking recites the facts.</p> <p>738. On undertaking for costs.</p> <p>739. Complaint on appeal bond or undertaking.</p> <p>740. Upon attachment bond or undertaking, general form.</p> <p>741. Upon attachment undertaking (Wisconsin).</p> <p>742. Upon an undertaking given by defendant to discharge an attachment, general form.</p> <p>743. On plaintiff's undertaking or bond in replevin, general form.</p> <p>744. On defendant's undertaking in replevin to secure return of the property.</p> <p>745. On bond to indemnify sheriff.</p> <p>746. On an injunction bond or undertaking.</p> <p>747. On a bond to discharge a subcontractor's mechanics lien (Iowa).</p> |
|---|---|

723. Complaint by municipality on bond of public officer.

I. That the plaintiff at the times hereinafter stated was and still is a municipal corporation organized and existing under the laws of the state of

II. That at the municipal election held in said city of on the day of, 19.., the defendant C.... D.... was duly elected to the office of for the period of years from the day of, 19..

III. That on the day of, 19.., the said C.... D.... as principal and the defendants E.... F.... and G.... H.... as sureties, made, executed and delivered to the said city of [or filed in the office of, *stating the officer in whose office the bond is required by law to be filed*] their certain bond or obligation in writing, of which a copy is attached hereto and made part of this complaint and marked Exhibit A.

IV. That on the day of, 19.., the said bond was duly approved by [*here state officer or officers whose duty it is to approve bond*] [*if an oath of office is required by law to be executed*: and that on the day of, 19.., the said defendant C.... D.... executed and filed in the office of, *state name of officer*, his oath of office as required by law] and that the said C.... D.... thereupon entered upon the duties of his said office and continued to exercise the same until on or about the day of, 19..

V. That [*here state particularly the acts complained of which constitute breaches of the bond as, for example, the following form*].

VI. That by reason of the premises, the plaintiff has suffered damages in the sum of dollars with interest from the day of, 19..

WHEREFORE, etc.

724. Assignment of breach of bond of municipal treasurer.

That said defendant C.... D.... between the day of, and the day of, received various sums of money as such treasurer, amounting to about the sum of dollars, and that he fraudulently, and in the breach of his trust, converted and appropriated to his own use said sum.

For a further breach the plaintiff alleges that said treasurer, on the day of, 19.., accounted with the plaintiffs concerning moneys which had come to his hands as said treasurer, and on such accounting was found to be in arrears and indebted to the plaintiff in the further sum of dollars, and that on the day of, 19.., the plaintiff demanded that he pay the same over to him, but he refused so to do, and no part thereof has been paid.

WHEREFORE, etc.

725. Assignment for breach of sheriff's bond for neglect to levy.

[*After alleging election and qualification of sheriff and execution of bond as in the first form in this chapter, proceed as follows*]:

That on the day of, 19.., in an action brought

by him against one M.... N.... the plaintiff recovered judgment, duly given by the court of against said M.... N.... for the sum of dollars, which judgment was on, etc., duly docketed in the office of the clerk of the court for the county of

That on the day of, 19.., an execution in favor of the plaintiff against the property of said M.... N.... was duly issued on said judgment and delivered to the said sheriff, of which a copy is attached hereto, made part of this complaint and marked Exhibit A.

That said sheriff did not execute said process, but although there was then within his county real and personal property belonging to said M.... N.... of which he might have levied the moneys thereby directed to be levied and of which he had notice, and though more than days elapsed after the delivery of said execution to said sheriff before the commencement of this action, he neglected and refused to make such levy, whereby the plaintiff lost his said debt.

That on the day of, 19.., leave was granted to the plaintiff by the court at to prosecute said bond by reason of the premises.¹

That on the day of, 19.., and prior to the service of the summons in this action, the plaintiff executed and filed with the clerk of this court [*or* with J.... P...., justice of the peace] an undertaking for costs signed by two sureties approved by said clerk [*or* justice] conditioned as required by law, which said sureties justified their responsibility by affidavit annexed to said undertaking in the manner prescribed by law, and that a copy of said undertaking and affidavit were duly served upon the defendants at the time of the service of the summons in this action.²

WHEREFORE, etc.

726. The same for neglect to sell after levy.

[Allege judgment and execution as in preceding form.]

That the said sheriff, by virtue thereof, on the day of

¹ In Minnesota, where the action is brought by a private person, leave to bring the same must be obtained. But it is held that leave to sue need not be alleged. *Hautzch v. Massolt*, 35 Minn. 167 s.c. 28 N. W. 191.

² In Wisconsin no leave is necessary, but in any action by a private person upon an official bond

security for costs must be given before the service of summons and a copy of the undertaking served on the defendant with the summons. Wis. Stats. 1898, sec. 986. In the other states covered by this work neither leave to sue nor security for costs seem to be necessary. Iowa Code sec. 4336; Cobbeys Ann. Stats. of Nebr. sec. 1655.

....., 19.., levied on the goods of said M.... N.... of the value of dollars; but he neglected to advertise and sell the goods so levied on by him as aforesaid, and although more than days elapsed after the delivery of said execution to said sheriff before the commencement of this action, no part of the moneys directed to be collected on the plaintiff's said execution has been received by the plaintiff and the plaintiff has lost his said debt.

[Insert allegations as to leave to prosecute, or undertaking for costs as in preceding form.]

727. The same, for neglect to return.

[Allege breach as follows] :

That said sheriff, by virtue of said execution, on the day of, 19.., levied on the goods of said M.... N.... of the value of dollars; but although more than sixty days [*or state other time within which the statute requires writ to be returned*] elapsed after its delivery to him and before this action, wholly neglected and failed to make return of said execution and no part of the moneys directed to be collected thereby has been received by the plaintiff, and the plaintiff has lost his said debt.

728. The same, for neglect to pay over moneys collected.

[Allege breach as follows] :

That the said sheriff thereafter collected and received upon said execution, for the use and benefit of plaintiff the sum of dollars, besides the costs and his lawful fees thereon. That more than days had elapsed since the issuance and delivery of said execution to the said sheriff before this action was commenced.

That said defendant, in violation of his duty as said sheriff, has failed and neglected to pay over to the plaintiff the amount so collected, or any part thereof, though often requested so to do, to the damage of this plaintiff in the sum of dollars, no part of which has been paid.

729. Allegation of judgment against sheriff for breach.

[Where judgment has been obtained against the sheriff add to the allegations of breach in the preceding forms the following] :

That thereafter, and on and about the day of, 19.., in an action brought by the plaintiff in the court, he recovered a judgment duly given against the said sheriff for the sum of dollars, for the damages which the relator had sustained by the neglect of the sheriff to execute [*or return*]

said process, and dollars costs of his said action, and no part thereof has been paid to the plaintiff.

730. Complaint by creditor on administration bond (Wis. Stats. 1898 secs. 4014, 4015, 4016).

I. That on the day of, 19.., one [*intestate*] died a resident of said county of and that on or about the day of, 19.., A.... B.... [*administrator*] was by order of the court of county duly appointed administrator of the estate of said [*intestate*].

II. That on the day of, 19.., the said [*administrator*] together with the defendants [*sureties*] executed and delivered to J.... K...., judge of the court of said county, their joint and several obligation in writing, of which a true copy is attached hereto, made part of this complaint and marked Exhibit A.

III. That the said instrument was thereupon duly approved by the judge aforesaid and letters of administration were thereafter and on the day of, 19.., duly issued by said court to the said [*administrator*] who thereupon entered upon the duties of his said trust and took possession of the property and assets of the estate of said [*deceased*] amounting in all to the sum of dollars.

IV. That the said [*intestate*] was during his lifetime indebted to the said plaintiff in the sum of dollars, with interest from, 19.., and that on the day of, 19.., the said claim of this plaintiff was upon due presentation adjusted and allowed by the said court of county at the sum of dollars.

V. That thereafter and on the day of, 19.., an order was duly made and entered by the said court of county, ordering and requiring the said [*administrator*] to pay to this plaintiff the said sum of dollars, and that on the day of, 19.., this plaintiff demanded payment thereof from the said [*administrator*] but that said administrator then refused and still refuses to pay the same.

VI. That thereafter and on the day of, 19.., upon application duly made therefor, the said court of county, by written order granted permission to the plaintiff to prosecute this action in his own name.

WHEREFORE the plaintiff demands judgment against the said defendants for the sum of dollars, with interest from [*date of demand*] with the costs of this action.

E.... F....
Plaintiff's Attorney.

731. Complaint by heir at law upon administration bond (Wisconsin).

[I, II and III as in last preceding form.]

IV. That the plaintiff was and is one of the heirs at law, to-wit, the son [or daughter, or otherwise] of said [deceased] and as such entitled to a one-third [or other] share in the estate of said deceased after the payment of debts and expenses of administration.

V. That thereafter, and on the day of, 19.., the said [administrator] duly accounted before the court of county for his acts as such administrator, and upon such accounting it was duly adjudged and decreed by said court on the day of, 19.., that the said [administrator] had in his hands of the assets of said estate a balance of dollars, and that the said [administrator] pay one-third [or other share] of such balance, to-wit, the sum of dollars to the plaintiff as his distributive share of said estate.

VI. That thereafter, and on the day of, 19.., this plaintiff demanded payment of said sum of dollars from the said [administrator] but that he then refused and still refuses to pay the same.

[Allege application and leave to sue, as in last preceding form.]

WHEREFORE, etc. [As in last preceding form.]

732. By administrator de bonis non on bond of former administrator, alleging maladministration (Wisconsin).

[I, II and III, as in Form 730.]

IV. That on the day of, 19.., the said [administrator] died [or was removed as such administrator, or tendered his resignation as administrator of said estate, which was duly accepted by the court of county, and that thereafter and on the day of, 19.., this plaintiff was by the court of said county duly appointed administrator *de bonis non* of said estate, and duly qualified as such and is now acting as such administrator *de bonis non*.

V. That said [administrator] collected and received assets belonging to said estate amounting to dollars and converted the same to his own use and refused and neglected to account therefor to the said court or to any court having jurisdiction thereof.

VI. That on the day of, 19.., the plaintiff demanded payment of said sum from the said [administrator] and

a settlement of his accounts, but said [administrator] refused to make said payment or to file an account with the said court.

VII. [*Allege obtaining of leave to sue as in Form 730.*]

WHEREFORE, etc.

733. By legatee on executor's bond (Wisconsin).

I. That on the day of, 19.., one [testator] died a resident of said county of leaving his last will and testament duly executed, by the terms of which the said [testator] bequeathed to this plaintiff the sum of dollars [or a copy of which will is hereto annexed, marked Exhibit A, and made a part of this complaint].

II. That thereafter and on the day of, 19.., upon application duly made for that purpose, the said last will and testament was by the judgment and decree of the court of county duly admitted to probate as and for the last will and testament of the said deceased, and the defendant [executor] was by order of said court appointed executor of said last will and testament and of the estate of said deceased.

III. and IV. [*As in paragraphs II and III of Form 730, with incidental changes made necessary by the fact that the bond sued on is that of an executor instead of an administrator.*]

V and VI. [*As in paragraphs V and VI of Form 732, with necessary changes.*]

[*Allege application and leave to sue as in Form 732.*]

WHEREFORE, etc. [*As in Form 730.*]

734. Complaint by county judge on bond of executor or administrator, for benefit of all parties (Wis. Stats. 1898 secs. 4014 subd. 4 and 4015).

I. That the plaintiff is now and was at the dates hereinafter mentioned the judge of the county court of county, Wisconsin, duly elected and qualified and brings this action in his said capacity as such judge by virtue of the statutes in such case made and provided.

II. [*Allege the death of the testator or intestate, the probate of his will if any, the appointment of the executor or administrator, the giving and approval of his bond, and the receipt of the assets of the estate by him, as in the preceding forms.*]

III. [*Allege the accounting of the executor or administrator, and the final order thereon, as in paragraph V of Form 731, setting forth the final order in full so as to show the amounts ordered to be paid to all parties.*]

IV. That the said [executor or administrator] upon demand duly made has refused and neglected, and still refuses and neg-

lects to comply with said judgment of distribution, or to pay over any of the sums so ordered to be paid.

WHEREFORE the plaintiff, in his capacity as county judge aforesaid, demands judgment against the said defendants for the sum of dollars [*full sum found due on accounting*] with interest from, 19.., and for the costs of this action.

E.... F....

Plaintiff's Attorney.

735. By heir on administration bond, general form, where leave to sue is not required.

I. That on or about the day of, 19.. [*intestate*] departed this life, and that [*administrator*] on or about the day of, 19.., was duly appointed administrator of his estate, who thereupon, with [*sureties*] executed and delivered to the court of county, their joint and several obligation in writing, of which a copy is hereto annexed, made a part hereof, and marked Exhibit A.

II. That said instrument was thereafter, and on the day of, 19.., duly approved by the judge of said county, and said [*administrator*] thereupon entered upon the duties of said administration and collected and received a large amount of assets belonging to said estate.

III. That on the day of, 19.., said [*administrator*] settled in said court his accounts of his said trust, and said court adjudged that there remained in his hands, after the payment of all debts and expenses, the sum of dollars, which he was required by order and judgment of said court to pay to the heirs of said estate as follows [*insert terms of the order*].

IV. That on the day of, 19.., he demanded of [*administrator*] said sum of dollars, which by the terms of said judgment said [*administrator*] was required to pay to the plaintiff, but that said [*administrator*] then refused and still refuses to pay the same to this plaintiff, or any part thereof.

WHEREFORE, etc. [*Demand for judgment for amount ordered paid, with interest from demand.*]

736. Allegation of conversion and refusal to account for assets.

[*I and II as in last preceding form.*]

III. That the following goods and chattels [*describe the goods, chattels, rights or credits which it is claimed came into the possession of the administrator but were not entered in the*

inventory] belonging to said estate, came into the possession of said administrator, which assets the said [*administrator*] neglected and refused to return in the inventory of property belonging to said estate, but has converted the same to his own use and wholly failed and refused to account for the same in his accounts as administrator or in his settlement with his said court.

IV. That the plaintiff is one of the heirs at law of said deceased, and entitled as such to one-third [*or other*] share in the distribution of said estate.

V. That by reason of the premises the plaintiff has sustained damage in the sum of dollars.

WHEREFORE, etc.

737. Complaint on undertaking for the prosecution of an action; short form, where undertaking recites the facts (sustained in *Morange v. Mudge*, 6 Abb. Pr. 243.)

I. That on or about the day of, 19.., the defendant made and executed an undertaking, a copy of which is hereto annexed and made a part of this complaint and marked Exhibit A.

II. That thereafter and on or about the day of, 19.., judgment was recovered in the action mentioned in said undertaking against the plaintiff and in favor of the defendant therein for the sum of dollars [*or otherwise, according to the fact*].

III. That on or about the day of 19.., a transcript of said judgment was duly filed in the office of the clerk of the court for county, and on the same day an execution against the property of the plaintiff named in said undertaking was duly issued to the sheriff of county, and after the expiration of sixty days was returned wholly unsatisfied.

IV. That on or about the day of, 19.., the plaintiff duly demanded payment of the said sum of dollars from the defendant in this action, but that no part thereof has been paid.

WHEREFORE, etc.

738. On undertaking for costs.

I. That heretofore one M.... N.... commenced an action in this court [*or in the court*] against this plaintiff, wherein such proceedings were had as that on the day of, 19.., the defendants above named executed and duly filed with the clerk of said court, for the benefit of this plaintiff an undertaking whereby they undertook and agreed [*set forth conditions*

of undertaking] [*or, an undertaking of which a true copy is annexed hereto, made part of this complaint and marked Exhibit A.*]

II. That such proceedings were thereafter had in said action as that this plaintiff, on the day of, 19.., recovered judgment therein against the said M.... N.... for dollars, his costs and expenses of defending said action.

III. That on the day of, 19.., at this plaintiff duly demanded payment of the said judgment from the said M.... N.... but no part thereof has been paid.

WHEREFORE, etc.

739. Complaint on appeal bond or undertaking.³

I. That on the day of, 19.., the plaintiff recovered a judgment against the defendant A.... B.... in the sum of dollars and costs, in an action pending in the court of county, wherein this plaintiff was plaintiff and the said A.... B.... was defendant.

II. That thereafter the defendant, said A.... B...., duly perfected his appeal from said judgment to the court of county, and on the day of, 19.., with the defendants C.... D.... and E.... F.... as sureties, duly executed and filed with the clerk of said court an appeal bond [*or undertaking*] which said bond, [*or undertaking*] was duly approved by the clerk of said court [*or judge of said court*] and a copy of which is hereto attached, marked Exhibit A, and made part of this complaint.

III. That on the day of, 19.., said court in said action rendered a judgment in favor of the plaintiff and against the defendant A.... B.... for the sum of dollars with his costs [*or affirming said judgment so appealed from, with dollars costs*].

IV. That neither of said judgments has been paid, nor any part thereof.

[*If demand be necessary before suit, or the lapse of any certain amount of time, allege the same.*]

WHEREFORE, etc.

740. Upon attachment bond or undertaking (general form).

I. That on the ... day of, 19.., said C.... D.... commenced in the court of county an action

³ Where the statute, as in some of the states, provides for entry of judgment against the sureties as well as against the principal upon

the determination of the appeal itself, this action is of course not necessary. Wis. Stats. 1898 sec. 3067.

against this plaintiff, and duly made and filed his affidavit for a writ [*or warrant, or order*] of attachment therein, in which he alleged as a ground of attachment [*state ground alleged*].

II. That at the same time said defendant C.... D.... as principal and E.... F.... and G.... H.... as sureties executed and delivered to the clerk of said court an undertaking [*or bond*] which was approved by the said clerk [*if approval be necessary*] which undertaking [*or bond*] was conditioned [*state the conditions*] [*or of which a true copy is annexed to this complaint, made a part hereof and marked Exhibit A*].

III. That upon the filing of said affidavit of attachment and undertaking [*or bond*] and at the request of the said C.... D.... a writ [*or warrant, or order, as it may be named in the statutes of the particular state*] was duly issued out of said court and under the seal thereof, directed to the sheriff of said county, and commanding him to [*state command of writ*] which said writ [*or warrant, etc.*] was received by said sheriff, who thereupon and on the day of, 19.., as such sheriff and in pursuance of such command levied upon and seized the following described personal property of the plaintiff [*describe property*] and held possession thereof for the space of days.

IV. That no just ground in fact existed for the issuance of the said writ [*or warrant, etc.*], that the plaintiff was not at the time of the making of said affidavit and the issuance of said writ about to conceal or convey his property with intent to defraud his creditors [*or otherwise specifically negative the grounds of attachment stated in the affidavit*] and that the statements in said affidavit set forth as grounds for the issuance of said writ were untrue in fact and that the said writ [*or warrant*] was wrongfully sued out.

V. That on the day of, 19.., the said attachment was, upon proceedings duly had, vacated and dissolved by order of the court, with costs.

VI. [*State damages suffered, as for instance*]: That at the time said writ [*or warrant*] of attachment was levied upon the goods of plaintiff as aforesaid he was engaged in the business of at the town of and that by reason of said levy and the removal of said goods by the officer under said order the business of the plaintiff was interrupted for the period of days and his credit greatly impaired [*or ruined*] whereby he has sustained damages, by reason of the wrongful suing out of said attachment, in the sum of dollars, no part of which has been paid.

WHEREFORE, etc. [*Demand for judgment.*]

741. Upon attachment undertaking (Wisconsin).⁴

[I, II and III as in Form 740.]

IV. That thereafter and within the time required by law the plaintiff, by special answer, duly traversed said affidavit, and that the issue arising on such traverse was tried before the court on the day of, 19.., and that said court then found and determined the issues so arising for this plaintiff, and made an order for the redelivery of said property to this plaintiff.

V. That thereafter and on the day of, 19.., the said action was tried before the court, and upon such trial judgment was duly rendered for this plaintiff and the damages sustained by this plaintiff by reason of the wrongful suing out of said writ of attachment were then and there assessed at the sum of dollars, and judgment for said sum together with the costs of said action was duly rendered by said court, no part of which judgment has been paid, and the same is unreversed and unappealed from.

WHEREFORE, etc. [*Demand for judgment.*]

742. Upon an undertaking given by defendant to discharge an attachment (general form).

I. That on or about the day of, 19.., in an action pending in the court of county wherein this plaintiff was plaintiff and one A.... B.... was defendant, a writ [*or warrant of attachment*] was duly issued to the sheriff of said county and by him levied upon certain personal property of said A.... B....

II. That thereafter, and on or about the day of, 19.., the said A.... B...., for the purpose of procuring a discharge of said attachment, as by statute provided, filed in said court an undertaking executed to the plaintiff by E.... F.... and G.... H...., the above named defendants, a copy of which undertaking is hereto attached, marked Exhibit A, and made a part of this complaint.

⁴In Wisconsin the defendant in attachment may, by special answer, traverse the statements of the affidavit and the issue thus raised is tried by the court independently of the trial of the action, and if the court on the trial of the traverse finds for the defendant the property seized is at once delivered up, and the damages suffered by the defendant are

assessed on the trial of the main issue, and either deducted from the plaintiff's recovery or, if the defendant defeats the plaintiff's claim, judgment is at once entered for the defendant for the amount of such excess in one case, or the whole amount of his damages in the other case, against the plaintiff. Wis. Stats. 1898, secs. 2745 to 2748 inclusive.

III. That said attachment was thereupon discharged and said property restored to said A.... B.... and that thereafter judgment was duly rendered in said action in favor of plaintiff and against the said A.... B.... for the sum of dollars.

IV. That [thereafter, on or about the day of, 19.., plaintiff demanded payment of said judgment and costs, but that] no part thereof has been paid.

WHEREFORE, etc.

743. On plaintiff's undertaking or bond in replevin (general form).

I. That on or about the day of, 19.., the defendant A.... B.... commenced an action in the court of county against the plaintiff to recover possession of certain specific personal property, to-wit, [*describe property*] and thereupon * delivered to the sheriff of county the affidavit and requisition required by law for the obtaining of the immediate delivery of the said property. [*In Nebraska, after the * substitute: and thereupon an order of delivery was issued in said cause to the sheriff of county.*]

II. That on said last named day the above named defendants made and delivered to said sheriff a written undertaking [or bond, *according to the fact*] whereby they jointly and severally undertook and agreed [*recite conditions of bond*] [or a copy of which is hereto annexed, made part of this complaint, and marked Exhibit A].

III. That under and pursuant to the said affidavit, requisition and undertaking [or bond] [*or, in Nebraska, pursuant to the said order of delivery and undertaking*] the said sheriff on or about the day of, 19.., replevied and took said property from the possession of the plaintiff and delivered the same to the defendant A.... B....

IV. That thereafter and on or about the day of, 19.., judgment was duly rendered by said court in said action, wherein it was adjudged that said property be returned to this plaintiff, or that he recover the value thereof in case a return could not be had, and damages for the taking and withholding thereof, and wherein it was further adjudged that said property was of the value of dollars, and that this plaintiff's damages were the sum of dollars.

V That said property has not been returned to this plaintiff, nor has the said value thereof nor any part of said damages been paid.

WHEREFORE, etc.

744. On defendant's undertaking in replevin to secure return of the property.

I. That heretofore and on or about the day of, 19.., this plaintiff commenced an action in the court against one C.... D.... to recover possession of certain personal property described as follows [*insert description*].

II. That such proceedings were thereafter had in said action that on or about the day of, 19.., the defendants made and delivered to the sheriff of county their written undertaking, of which a copy is hereto annexed, made part of this complaint, and marked Exhibit A.

III. That such proceedings were thereafter had in said action that on or about the day of, 19.., this plaintiff recovered judgment, which was duly given by said court in said action against said C.... D.... the defendant therein, that the plaintiff recover possession of said property, or the sum of dollars in case a delivery could not be had, and for the sum of dollars damages and costs.

IV. That no return of the property has been had, and no part of said judgment has been satisfied.

WHEREFORE, etc.

745. On bond to indemnify sheriff.

I. That the plaintiff at all the times hereinafter mentioned was the duly elected and qualified sheriff of the county of and was performing the duties of such office.

II. That on the day of, 19.., the defendant caused an execution to be issued out of the court of county upon a judgment before that time recovered by said defendant in said court against one A.... B...., which execution was delivered to plaintiff as sheriff aforesaid.

III. That the defendant C.... D.... thereupon demanded of the plaintiff that he levy said execution upon certain personal property as the goods and chattels of the said A.... B...., but which goods and chattels were then and there afterwards claimed by one E.... F...., and that the said plaintiff refused to make such levy unless indemnified therefor.

IV. That thereupon the defendant, for the purpose of indemnifying the plaintiff, executed and delivered to plaintiff an obligation in writing, a copy of which is hereto annexed, marked Exhibit A, and made a part of this complaint.

V. That thereupon the plaintiff, as sheriff aforesaid, relying on said obligation, levied upon and sold said goods under said

execution and paid over the proceeds of said sale, less costs, to the defendant.

VI. That on the day of, 19.., said E.... F.... brought an action against the plaintiff for the conversion of said goods so levied upon under said execution, and on the day of, 19.., recovered a judgment against the plaintiff for the sum of dollars as the value of the goods, and dollars costs, and the plaintiff was compelled to pay the sum of dollars necessary expenses in defending said action.

That on the day of, 19.., said defendant was duly notified of the pendency of said action and afterwards that judgment had been rendered against the plaintiff in said cause, but he has failed and neglected to pay the same and save plaintiff harmless as provided in said bond.

That plaintiff has sustained damages, by reason of the premises, in the sum of dollars.

WHEREFORE, etc.

746. On an injunction bond or undertaking.

I. That on or about the day of, 19.., in an action brought by A.... B.... against this plaintiff, an injunctive order issued out of this court [*or the court*] was duly served on this plaintiff, by which this plaintiff was temporarily enjoined from [*state effect of injunction*].

II. That at the time of the issuing of the said injunctive order in the said action, and for the purpose of causing the same to be issued the defendants made and filed a written undertaking in said court by which they jointly and severally undertook and agreed to pay the plaintiff all damages he might sustain, not exceeding the sum of dollars if it should finally be decided that the plaintiff was not entitled to said order, a copy of which is hereto annexed, marked Exhibit A, and made part of this complaint.

III. That on or about the day of, 19.., judgment was duly rendered by said court in said action, and it was thereby adjudged that the said A.... B.... was not entitled to the said injunctive order, and the same was dissolved and vacated.

IV. That the damages sustained by this plaintiff by reason of the said injunctive order amounted to the sum of dollars, and interest from the day of, 19.., which the said court on that day determined and awarded to this plaintiff, and that no part thereof has been paid.

WHEREFORE, etc.

**747. On a bond to discharge a subcontractor's mechanics lien
(Iowa Code sec. 3093).**

[Allege the furnishing of materials or labor, the filing of the claim, and the giving of notice to the owner, as in the appropriate form in Chapter LXVIII, post, and continue] :

That on or about the day of, 19.., said [*owner or principal contractor*] filed with the clerk of said court a bond duly executed by him, with the defendants J.... K.... and L.... and M.... as sureties, in the sum of dollars, which bond was duly approved by said clerk and conditioned for the payment of any sum for which the plaintiff might obtain judgment upon the demand for which such statement or account was filed, and thereupon said premises were discharged from said lien.

Allege rendition of judgment against owner or principal contractor, and its nonpayment.]

WHEREFORE, etc.

CHAPTER XXXII.

COMPLAINTS ON GUARANTIES.

- | | |
|---|---|
| 748. Against sureties for rent. | 751. On guaranty of an existing debt. |
| 749. Against principal and sureties on contract for services. | 752. On a guaranty of a mortgage debt, to recover deficiency. |
| 750. Against guarantor, for goods sold to third person. | |

748. Against sureties for rent.

I. That on or about the day of, 19.., one M.... N.... by agreement in writing with this plaintiff, hired of the plaintiff [*designate the premises, e. g., thus: the building No.... Street, in the city of*] at the yearly rent of dollars, payable [quarterly] on the day of, etc.

II. That the defendant, in consideration of the premises and of one dollar to him paid, and as security for the punctual payment of said rent, then and there subscribed and delivered to the plaintiff an agreement in writing, of which the following is a copy [*insert copy of guaranty*] [*or say, an agreement in writing, and thereby agreed that if any default should be made therein he would pay to the plaintiff such sum of sums of money as should be sufficient to make up such deficiency and fully satisfy the conditions of said agreement, without requiring any notice of nonpayment or proof of demand made*].

III. That said M.... N.... has made default in the payment of the sum of dollars, which was due for said rent on, etc.

IV. That before the commencement of this action [and on the day of, 19..] the plaintiff [duly demanded of said M.... N.... payment thereof, and gave to the defendant due notice and proof of said demand and nonpayment, and then and there] duly demanded payment from the defendant of said sum, but no part thereof has been paid.

WHEREFORE, etc.

749. Against principal and sureties on contract for services.¹

I. That heretofore certain articles of agreement were made and entered into between the plaintiff, of the first part, and the

¹ See note to Form 752, *infra*.

said defendant C.... D.... of the second part, under their respective hands and seals, and bearing date the day of, 19.., of which a copy is hereto annexed, made a part of this complaint and marked Exhibit A.

II. That on the day of, 19.., simultaneously with said agreement, and in consideration thereof, the said defendants E.... F.... and G.... H.... executed an agreement in writing, under their respective hands and seals, written at the foot of said agreement, of which a copy is hereto annexed, made a part of this complaint and marked Exhibit B.

III. That the plaintiff afterwards duly performed all the conditions of the said contracts on his part, and that the same were fully completed on the day of, 19.., and that on that day he was entitled to have and receive from the said defendant C.... D.... and the said defendants E.... F.... and G.... H.... upon the said contract, for the said work, a large sum of money, viz., the sum of dollars.

IV. That the said defendants have wholly failed to perform the said contracts on their parts, and have wholly neglected and refused to pay the said sum of dollars, and are now indebted to the plaintiff, upon the said contract, in the sum aforesaid, with interest from, etc.

WHEREFORE, etc.

750. Against guarantor, for goods sold to third person.²

I. That on the day of, 19.., at, in consideration that the plaintiff, at the request of the defendant, would sell to one M.... N...., on a credit of months, such goods as said M.... N.... should desire to buy of this plaintiff [*or other consideration*] the defendant promised, by agreement in writing, to be answerable to the plaintiff for the payment by said M.... N.... of the price of goods so sold on credit [*if the amount of the guaranty was limited, add: to an amount not exceeding a total credit of dollars at any one time, or otherwise, as the limit may have been*] a copy of which agreement is attached hereto, made a part of this complaint, and marked Exhibit A.

II. That this plaintiff afterwards, and on the faith of said guaranty, sold and delivered to said M.... N.... [*designate briefly the goods sold*] for the sum of dollars, upon a

² Upon an absolute guaranty of payment or performance of a contract no notice to the guarantor of demand upon or default of the original promisor is necessary.

Hubbard v. Haley, 96 Wis. 578 s.c. 71 N. W. 1076; 16 Ency. Pl. & Pr. p. 946-7. *Contra* apparently: Wagon Co. v. Dier, 10 Nebr. 234 s.c. 4 N. W. 995.

credit of months, which sum became due therefor from said M.... N.... to this plaintiff on, etc.

III. That payment of the same was thereafter duly demanded from said M.... N...., but the same was not paid; of all which due notice was given to the defendant.

IV. That on the day of, 19.., at payment of the same was duly demanded by the plaintiff from the defendant, but no part thereof has been paid [except the sum of, etc.]

WHEREFORE, etc.

751. On guaranty of an existing debt.*

I. That on the day of, 19.., at, one M.... N...., being then indebted to this plaintiff in the sum of dollars, which sum was then [or, on the day of, 19.., became] due and payable to the plaintiff, the defendant for a valuable consideration then paid to him by plaintiff made and subscribed a memorandum in writing, of which the following is a copy: [*copy of the guaranty*] and delivered the same to the plaintiff.

II. That the said M.... N.... has never paid said indebtedness, and that plaintiff duly performed all the conditions of said agreement on his part, and there is now due to him thereon from the defendant the sum of dollars, with interest thereon from, etc.

WHEREFORE, etc.

752. On a guaranty of a mortgage debt, to recover deficiency.*

I. That on or about the day of, 19.., the defendants entered into an agreement in writing with the plaintiff, under their hands and seals, of that date, in the words and figures following: [*copy of agreement*].

* A new consideration is essential to the validity of a guaranty of a previously existing obligation. *Bank v. Ross*, 91 Wis. 320. Mere extension of time, or forbearance to sue the original debtor is not a consideration which will support such a promise. *Twohy Mfg. Co. v. Ryan Co.*, 94 Wis. 319. See also *Bank v. Smith*, 107 Wis. 574.

* At common law a guarantor of an obligation could not be joined as defendant in an action against his principal, because he is bound

by a separate contract. *Bliss on Code Pleading*, sec. 94 (3rd Ed.). By statute, however, in many states this rule has been changed, and he may be joined in the same action. *Wis. Stats.* 1898 sec. 2609; see also sec. 3156; *Palmeter v. Carey*, 63 Wis. 426 s.c. 21 N. W. 793; *Iowa Code* sec. 3465; *Marvin v. Anderson*, 11 Ia. 371; *Minn. Rev. Laws* 1905 sec. 4062; *Hammel v. Beardsley*, 31 Minn. 314 s.c. 17 N. W. 858; *N. Dak. Rev. Codes* sec. 5233; *S. Dak. Rev. Code C. P.*

II. That the principal sum secured by the bond and mortgage referred to in the said agreement became due and payable on, etc., and that on or about, etc., the plaintiff commenced an action in the court for the county of for the foreclosure of said mortgage, the principal sum thereof, with interest, not having been paid; and such proceedings were thereupon had that, on the day of, 19.., a decree or judgment-order in said action was made by the said court for the foreclosure of the said mortgage and sale of the premises, and that if the proceeds of such sale should be insufficient to pay the amount reported due to the plaintiff, with interest and costs, the amount of such deficiency should be specified in the report of sale therein, and W.... X...., one of the defendants therein, should pay the same to the plaintiff.

III. That pursuant to said decree or judgment-order, the premises were duly sold on, etc., by the sheriff of, etc., for the price or sum of dollars [and that the plaintiff became the purchaser thereof].

IV. That upon said sale there occurred a deficiency of, etc., as appears by the sheriff's report of said sale, duly filed in the office of the clerk of, etc., and that thereupon, to-wit, on the day of, 19.., a judgment was rendered in said court against W.... X.... in favor of the plaintiff, for the said sum of dollars, with interest from, 19.., of which no part has ever been paid.

V. That before the commencement of this action he demanded of the defendants payment of the amount of such deficiency, and at the same time tendered to them an assignment of said judgment against W.... X...., duly executed by the plaintiff, but that the defendants refused to pay the same, and have ever since neglected and refused to pay the same, although the plaintiff has always been and still is ready and willing to deliver to said defendants an assignment of said judgment upon being paid the amount due thereon.

WHEREFORE, etc.

sec. 90. Under the Nebraska statute, however (Cobbey's Ann. Stats. of Nebr. sec. 1040) it is held that a guarantor of a note cannot be joined in the same action with the

maker. *Mowry v. Mast*, 9 Nebr. 445 s.c. 4 N. W. 69; see also *Weitz v. Wolfe*, 28 Nebr. 500 s.c. 44 N. W. 485.

CHAPTER XXXIII.

COMPLAINT ON CHARTER-PARTIES.¹

- | | |
|--|--|
| 753. Ship owner against charterer,
for freight. | 756. Shipowner against charterer
for not loading. |
| 754. The same, a shorter form. | 757. The same, for demurrage. |
| 755. The same, against assignee of
cargo. | 758. Charterer against shipowner
for abandoning voyage. |

753. Ship owner against charterer, for freight.

I. That at, on or about, 19.., plaintiff and defendant agreed by charter-party that the plaintiff's ship, called, should with all convenient speed sail to and that the defendant should there load her with a full cargo of or other lawful merchandise, which she should carry to and there deliver, on payment by the defendant to the plaintiff of freight at dollars per ton, one-half of such freight to be paid in cash on unloading and right delivery of the cargo, and the remainder by approved bills on at months, or in cash less per cent. discount, at the defendant's option. [*Or plead the agreement by copy, thus: That on or about the day of, 19.., the plaintiff and defendant entered into an agreement, of which a true copy is attached hereto, made part of this complaint and marked Exhibit A.*]

II. That afterwards the said ship accordingly sailed to aforesaid, and was there loaded by the defendant with a full cargo of lawful merchandise, and the plaintiff carried the said cargo in said ship to aforesaid, and there delivered the same to the defendant.

III. That said freight amounted in the whole to the sum of dollars, and the defendant paid to the plaintiff one-half of said freight in cash, and all conditions were fulfilled, and all things happened, and all times elapsed which were necessary to entitle the plaintiff to maintain this action; yet the defendant did not pay to the plaintiff the remainder of said freight, either by such approved bills as aforesaid, or in cash, less discount as aforesaid.

WHEREFORE, etc.

¹ The forms in this chapter are from Abbott's Forms, Vol. 1 pp. taken without substantial change 288-291.

754. The same, a shorter form.²

I. [*As in last preceding form.*]

II. That the plaintiff duly performed all the conditions on his part, but that no part of said freight has been paid [except the sum of, etc.]

WHEREFORE, etc.

755. The same, against assignee of cargo.

I. That on or about the day of, 19.., the plaintiff and one M.... N.... agreed by charter-party [*continue as in paragraph I of preceding form, substituting the charterer's name for the word "defendant"*].

II. That thereafter the said M.... N.... assigned the cargo [or the charter-party and cargo] to the defendant, who thereupon became the owner thereof and entitled to receive the same.

III. [*Continue as in preceding form, paragraphs II and III.*]

WHEREFORE, etc.

756. Shipowner against charterer for not loading.

I. That on the day of, 19.., the plaintiff and defendant agreed by charter-party that the defendant should deliver to the plaintiff's ship at on the day of, 19.., ... tons of [merchandise] which she should carry to, and there deliver, on payment of dollars freight; and that the defendant should be allowed days for loading, and days for discharging, and days for demurrage, if required, at dollars per day.

II. That the plaintiff duly performed all the conditions on his part, but the defendant made default in loading the agreed cargo, and failed to provide it, to the plaintiff's damage dollars.

WHEREFORE, etc.

757. The same, for demurrage.

I. [*As in preceding form.*]

II. That the plaintiff duly performed all the conditions on his part.

III. That the defendant kept the said ship on demurrage days over and above the periods so agreed upon for loading and discharging as aforesaid, but has not paid the same;

² This short form of pleading the performance of conditions precedent is authorized by Wis. Stats. 1898 sec. 2674; Minn. Rev. Laws 1905 sec. 4150; Iowa Code

sec. 3626; N. Dak. Rev. Codes sec. 5286; S. Dak. Rev. Code C. P. sec. 139; Cobbey's Ann. Stats. of Neb'r. sec. 1128.

and that the defendant also detained the ship days beyond the periods so agreed on for loading, discharging and demurrage as aforesaid, whereby the plaintiff during all that time was deprived of the use of the ship and incurred dollars expense in keeping the same and maintaining the crew thereof.

WHEREFORE, etc.

758. Charterer against shipowner for abandoning voyage.

I. That on or about the day of, 19.., at the plaintiff and defendant agreed by charter-party that the defendant's ship called then at should with all convenient speed, having liberty to take an outward cargo for owner's benefit, sail to or so near there as she could safely get, and there load from the plaintiff [*or the factor of the plaintiff*] a full cargo of or other lawful merchandise, which he should carry to and there deliver, on payment of freight [*certain perils and casualties in the said charter-party mentioned only excepted*].

II. That the plaintiff duly performed all the conditions on his part.

III. That said ship was not prevented by any of said perils or casualties from completing said outward voyage, but that she did not with all convenient speed sail to or so near thereto as she could safely get; and the defendant caused the said ship to deviate from her said voyage and abandon the same, to the plaintiff's damage dollars.

WHEREFORE, etc.

CHAPTER XXXIV.

COMPLAINTS ON INSURANCE POLICIES.

- | | |
|--|--|
| 759. Complaint on fire policy by owner insured. | 768. On a membership certificate of a fraternal insurance order. |
| 760. The same, by mortgagee under provision in policy issued to owner. | 769. By insured on accident policy. |
| 761. Upon a fire policy renewed before the fire. | 770. By personal representatives of insured upon accident policy when accident caused death. |
| 762. By purchaser of property to whom policy was assigned. | 771. Upon a valued marine policy. |
| 763. On an agreement to insure, policy not issued. | 772. The same, on an open policy. |
| 764. By executor on life policy. | 773. Upon freight. |
| 765. By wife, partner or creditor insured. | 774. Averment of loss by collision. |
| 766. By wife, on life policy issued to husband in her favor. | 775. Averment of waiver of a condition. |
| 767. By assignee in trust for wife of insured. | 776. For a partial loss and contribution to general average. |

759. Complaint on fire policy by owner insured.

I. That the defendant is and was at the times hereinafter mentioned a insurance corporation duly organized and existing under the laws of this state for the purpose of insuring property against loss by fire [*or, if a foreign corporation, duly organized and existing under the laws of the state of for the purpose of insuring property against loss by fire, and lawfully engaged in the business of fire insurance within this state*].

II. That on the . . . day of, 19. . ., in consideration of the payment by the plaintiff to the defendant of the premium of dollars, the defendant, by its agents duly authorized thereto, made its policy of insurance in writing, a copy of which is annexed and made part of this complaint, and marked Exhibit A, and thereby insured the plaintiff against loss or damage by fire to the amount of dollars upon his [dwelling-house and his furniture therein] in the city of

III. That at the time of making said insurance [*or at the time of the commencement of the risk*] and from then until the fire hereinafter mentioned, the plaintiff was the owner in fee of the said property so insured.

IV. That on the day of, 19.., and while said policy was still in force, said dwelling-house and furniture were totally destroyed [*or damaged, and in part destroyed*] by fire, which did not happen from any of the causes excepted in said policy.

V. That the said building and furniture when so destroyed [*or damaged*] was of the value of dollars [*and if the loss be partial, that the loss and damages sustained by the plaintiff by reason thereof was the sum of dollars.*

VI. That the plaintiff duly fulfilled all the conditions of said insurance on his part [*and more than sixty days, or as otherwise required by the policy*], before the commencement of this action, to-wit, on the day of, 19.., gave to the defendant due notice and proof of the fire and loss aforesaid, as required by said policy.

VII. [*Where appraisement is required by the policy*]: That thereafter and before the commencement of this action the plaintiff's loss from said fire was duly ascertained and estimated by this plaintiff and said company at the sum of dollars. [*Or where the appraisement has been had by a board of appraisers*]: That thereafter and before the commencement of this action, the parties being unable to agree upon the amount of plaintiff's loss, two appraisers and an umpire [*or three referees, or otherwise as the policy requires*] were duly selected in accordance with the terms of said policy to estimate and appraise the plaintiff's said loss and that said appraisers and umpire [*or referees*] duly made their award in writing and found said loss to be the sum of dollars, and that the plaintiff duly demanded payment of said last named sum on the day of, 19.., which payment was refused.

VIII. That plaintiff had no other insurance on said property [*or that plaintiff had upon said property, in addition to said policy of defendant, insurance amounting to dollars and no more*].

IX. That no part of the said sum has been paid, and the same is now due from the defendant to the plaintiff.

WHEREFORE, etc.

760. The same, by mortgagee under provision in policy issued to owner.

[*I, II and III as in last preceding form, substituting the name of owner for the word "plaintiff" and adding to paragraph II: loss if any payable to this plaintiff as his mortgage interest may appear.*]

IV. That on or about the day of, 19.., said

[owner] to secure the payment of the sum of dollars then owing by him to this plaintiff, made and delivered to this plaintiff a mortgage upon said premises with a covenant therein to keep said premises insured against damage by fire for the benefit of this plaintiff as mortgagee aforesaid, and that said debt remains wholly unpaid, and that the same, together with said mortgage is now held and owned by this plaintiff.

[Allege loss, performance of conditions and nonpayment as in preceding form, with incidental changes necessary by reason of the fact that plaintiff is the mortgagee instead of owner.]

WHEREFORE, etc.

761. Upon a fire policy renewed before the fire.

[Follow either of the foregoing forms, and insert after paragraph III the following]:

IV. That on or about the day of, 19.., the defendant, in consideration of dollars to it paid by the plaintiff [or by the owner] executed and delivered to plaintiff [or owner] its certificate of renewal of said policy, a copy of which is annexed and made part of this complaint and marked Exhibit B, and thereby renewed said insurance for the term of years from said day of, 19..

[Continue as in preceding forms.]

762. By purchaser of property to whom policy was assigned.

I, II and III. *[As in first form in this chapter, substituting name of original owner for the word "plaintiff" and changing allegation of ownership so as to show when original owner's title ceased.]*

IV. That on or about the day of, 19.., the said [original owner] duly sold and conveyed to the plaintiff said property and all his right, title and interest therein, and this plaintiff continued to be the owner in fee thereof until the time of the fire hereinafter mentioned; and that on said day of, 19.., the said [original owner] with the consent of the defendant duly indorsed in writing thereon, assigned and transferred said property to this plaintiff.

[Allege loss and subsequent essential facts as in first form in this chapter.]

WHEREFORE, etc.

763. On an agreement to insure, policy not issued.

I. *[Allege incorporation, etc., of defendant, as in paragraph I of first form in this chapter.]*

II. That on the day of, 19.., the plaintiff was the owner in fee of the dwelling house situate on lot in block in the city of and on said day applied to E.... F.... the agent of the defendant, and lawfully authorized to make the contract hereinafter set forth, for insurance against loss or damage by fire upon said dwelling house. And on the day aforesaid, said defendant by its said agent, in consideration of the sum of dollars then duly paid by plaintiff, agreed to insure said property against loss or damage by fire for the sum of dollars for years from that time, and agreed to make and deliver to the plaintiff within a reasonable time a policy of insurance for dollars, in the usual form of such policies issued by the defendant [*or in the standard form required by the laws of the state of*]

III. That it was expressly agreed by and between the plaintiff and defendant at the time of making said contract that said insurance should commence and be binding on the defendant from the time of the receipt of said premium, to-wit, the day of, 19..

IV. That by the terms of the policies of insurance issued by the defendant in the usual form [*or by the terms of the standard policy of insurance so agreed to be issued by the defendant*] the said defendant promises and agrees [*state the substance of the agreements and conditions of the proposed policy*].

V. That the defendant neglected to make or deliver to the plaintiff said policy of insurance so agreed to be issued, and that on the day of, 19.., while said agreement to insure was in full force, said dwelling-house was entirely destroyed by fire, which fire did not occur from any of the causes excepted in said proposed policy of insurance.

VI. That the value of said building at the time said fire occurred was the sum of dollars.

VII. That on the day of, 19.., the plaintiff furnished to the defendant proof of his loss and interest in said building, and duly performed all the conditions of said agreement and of said proposed policy on his part to be performed.

VIII. That no part of said loss has been paid, and that defendant denies all liability to the plaintiff upon said agreement to insure, and refuses to perform on its part any of the agreements or conditions of its said agreement to insure, or of said proposed policy of insurance, and that there is now due from the defendant to the plaintiff thereon the sum of dollars, with interest from, 19..

WHEREFORE, etc.

764. By executor on life policy.

I. [*Allege incorporation, etc., as in first form in this chapter, with necessary changes to show that defendant is engaged in the business of life insurance.*]

II. That on the day of, 19.., in consideration of the payment by one E.... F.... to the defendant, of the premium of dollars annually during his life, the defendant by its agents duly authorized thereto, made their policy of insurance in writing, a copy of which is annexed and made part of this complaint and marked "Exhibit A," and thereby insured the life of said E.... F.... in the sum of dollars.

III. That on the day of, 19.., said E.... F.... died, which death was not caused by [*the causes excepted in the policy*].

IV. That prior to his said death the said E.... F.... had duly made and executed his last will and testament, by which the plaintiff was appointed the sole executor thereof, and that on the day of, 19.., said will was duly proved and admitted to probate in the court of the county of and letters testamentary thereupon were thereafter duly issued and granted to the plaintiff as sole executor by the said court, and this plaintiff thereupon and before the commencement of this action duly qualified as such executor and entered upon the discharge of the duties of his said office.

V. That said E.... F.... and the plaintiff each duly fulfilled all the agreements and conditions of said policy of insurance on his part, and that this plaintiff on the day of, 19.., made and delivered to the defendant due notice and proof of the death of said E.... F.... in accordance with the requirements of said policy.

VI. That no part of the same has been paid, and the said sum of dollars, with interest from, 19.., is now due thereon from the defendant to the plaintiff, as such executor.

WHEREFORE, etc.

765. By wife, partner or creditor insured.

I. [*For allegation of incorporation see first form in this chapter.*]

II. That on the day of, 19.., in consideration of the payment by the plaintiff to the defendant of the annual premium of dollars, the defendant by its agents duly authorized thereto made and delivered to the plaintiff their

policy of insurance upon the life of E.... F...., a copy of which is annexed and made part of this complaint and marked "Exhibit A," and thereby insured the life of said E.... F.... in the sum of dollars, payable to the plaintiff within sixty days after due notice and proof of the death of said E.... F....

III. That the plaintiff was then the wife of said E.... F.... [or the partner of said E.... F.... in the business of, etc., or, a creditor of said E.... F.... to the amount of dollars, *stating facts showing his interest in the life*] and as such had a valuable interest in the life of said E.... F....

IV. That on the day of, 19.., at said E.... F.... died, which death was not caused by [*the causes excepted in the policy*].

V. That the said E.... F.... and this plaintiff each duly performed all the conditions and agreements of said policy of insurance on their part to be performed, and that this plaintiff on the day of, 19.., made and delivered to the defendant due notice and proof of the death of the said E.... F.... in accordance with the requirements of said policy.

VI. [*As in paragraph VI of last preceding form.*]

WHEREFORE, etc.

766. By wife, on life policy issued to husband in her favor.

I. [*Allege incorporation and business, as in first form in this chapter.*]

II. That on the day of, 19.., the defendant, in consideration of the payment to it of a premium of dollars, made and delivered to one E.... F.... its policy of insurance, and thereby insured the life of the said E.... F.... in the sum of dollars, payable to plaintiff within days after notice and proof of the death of the said E.... F.... a copy of which policy is hereto annexed and made part of this complaint and marked Exhibit A.

III. That on the day of, 19.., in the city of the said E.... F.... died.

IV. That plaintiff was the wife of the said E.... F.... at the time said policy was issued to him, and so remained at the time of his said death.

V. That up to the time of the death of the said E.... F.... all premiums which accrued on said policy were paid at the time they accrued, and that in all other respects the said E.... F.... duly performed all the agreements and conditions of said policy on his part.

VI. That on the day of, 19.., plaintiff fur-

nished defendant with due notice and proof of the death of the said E.... F.... and in all other respects duly performed the conditions of said policy on her part.

VII. That no part of said sum has been paid by the defendant, though payment thereof has been demanded by this plaintiff, and that there is now due and owing from the defendant to the plaintiff upon said policy the sum of dollars, with interest from, 19..

WHEREFORE, etc.

767. By assignee in trust for wife of insured.

I. [*For allegation of incorporation of defendants, etc., see first form in this chapter.*]

II. That on the day of, 19.., in consideration of the payment by one E.... F.... to the defendant of the premium of dollars [annually during his life] the defendant by its agents duly authorized thereto made its policy of insurance in writing, a copy of which is annexed and made part of this complaint, and marked Exhibit A, and thereby insured the life of said M.... N.... in the sum of dollars, payable sixty days after due notice and proof of the death of the said E.... F....

III. That on the day of, 19.., the said E.... F.... [with the written consent of the defendant, by its said agents, duly indorsed on the policy, or otherwise state such consent as is required by the terms of the policy] duly assigned said policy of insurance to this plaintiff in trust for G.... H...., who then was the wife of said E.... F.... and remained such until the death of said E.... F.... as hereinafter stated.

IV. That up to the time of the death of E.... F.... all premiums accrued upon said policy were duly paid.

V. That on the day of, 19.., at said E.... F.... died, which death was not caused by [*the causes excepted in the policy*].

VI. That said E.... F.... and the plaintiff each duly fulfilled all the conditions of said insurance on their part, and the plaintiff, more than sixty days [*or as otherwise required by the policy*] before the commencement of this action, to-wit, on the day of, 19.., gave to the defendant due notice and proof of the death of said M.... N.... as aforesaid, and duly demanded payment of the said sum of dollars.

VII. That no part of the same has been paid, and the said sum is now due thereon from the defendant to the plaintiff, with interest from, 19..

WHEREFORE, etc.

768. On a membership certificate of a fraternal insurance order.

I. That the defendant is, and was at the dates hereinafter named, a mutual benefit association or fraternal order duly incorporated under the laws of the state and doing the business of insuring the lives of its members upon the mutual or assessment plan, and that on the day of, 19.., one E.... F.... was received into said association as a member thereof, and remained such member in good standing and entitled to all the privileges and benefits appertaining to his said membership until his death, as hereinafter stated.

II. That at the time said E.... F.... was so received as a member of said association said defendant duly executed and delivered to him a certain written and printed certificate bearing date the day of, 19.., a copy of which certificate is attached hereto and made a part hereof and marked Exhibit A.

III. That the said E.... F.... during his lifetime fully complied with the requirements of the articles of association of the defendant, and with all its regulations and by-laws in force at the time of the issuance of said certificate and thereafter adopted, and performed all the agreements and conditions of said certificate on his part to be performed.

IV. That said E.... F.... died on or about the day of, 19.., but not from any of the causes excepted in said certificate or the by-laws of said defendant, and that this plaintiff on the day of, 19.., and more than sixty days before the commencement of this action, made and delivered to the defendant due notice and proof of the death of the said E.... F.... and performed all the conditions of said certificate and of the by-laws of said association required to be performed on her part.

V. Upon information and belief, that since the death of said insured there has been and still is in the treasury of defendant a sufficient sum to pay the plaintiff's claim, and all other just claims against the defendant [*or* that defendant since the death of said E.... F.... has wholly refused and neglected to levy or collect any assessment upon its members to pay plaintiff's said claim, notwithstanding sufficient funds to pay the same might have been procured by such levy and collection].

VI. That no part of said sum has been paid and that plaintiff is still the holder and owner of said certificate.

WHEREFORE, etc.

769. By insured on accident policy.

I. [See first form in this chapter for allegation of incorporation, etc.]

II. That on or about the day of, 19.., in consideration of the payment by plaintiff to defendant of an annual premium of dollars, defendant made and delivered to plaintiff its policy of accident insurance in writing, a copy of which policy is hereto attached, made part hereof, and marked Exhibit A.

III. That on or about the day of, 19.., while said policy was in full force plaintiff received a personal injury through external, violent and accidental means, to-wit [*describe the manner of inflicting it, as: by the accidental discharge of a gun in the hands of one X.... Y....*]

IV. That by reason of said injury plaintiff was prevented for the space of months from prosecuting his occupation as a

V. That the plaintiff duly performed all the conditions of said policy on his part to be performed and on the day of, 19.., and more than days before the commencement of this action gave to the defendant due notice and proof of said accident and the duration of his said disability and demanded payment of the sum of dollars, which the defendant refused.

VI. That no part of said sum has been paid, and that there is now due and owing from the defendant to the plaintiff the sum of dollars, with interest from the day of, 19..

WHEREFORE, etc.

770. By personal representatives of insured upon accident policy when accident caused death.

I, II and III. [*As in last preceding form, substituting the name of the insured for the word "plaintiff."*]

IV. That by reason of said injury, and as the direct result thereof, the said insured died on or about the day of, 19.., a resident of the county of state of, and that thereafter and on or about the day of, 19.., this plaintiff, upon proceedings duly had, was by order of the court of county, state of, duly appointed administrator of the estate of said deceased, and duly gave bond and qualified as such, and is now such administrator duly qualified and acting.

V and VI. [*As in last preceding form, changing paragraph*

V so that it alleges that both the plaintiff and the insured duly performed all the conditions of the policy.]

WHEREFORE, etc.

771. Upon a valued marine policy.

I. [*Allege incorporation, etc., as in first form in this chapter.*]

II. That on the day of, 19.., in consideration of the premium of dollars, then and there paid to them by the plaintiff [*or which this plaintiff then and there agreed and became liable to pay to the defendant*] the defendant, by its agent duly authorized thereto, made its policy of insurance in writing, of which a copy is annexed and made part of his complaint, and marked Exhibit A * and thereby insured for him dollars upon the ship [*or upon the cargo, or certain goods then laden, or about to be laden upon the ship*] then lying in the harbor of, etc. [*or as the case was*] for a voyage from to against the perils of the seas [*or the perils of fire, mentioning the perils which occasioned the loss*] and other perils in the policy mentioned.

III. That on the day of, 19.., the said ship sailed from said on the voyage described in the policy, and while proceeding therein [*or during said voyage and while lying in the port of, etc.*], was by the perils of the seas wrecked and totally lost [*or was burned and wholly destroyed by fire*].

IV. That the plaintiff was at the time of the commencement of the risk and thereafter until the said loss, the owner of said [*insured property, or interested in said insured property*] to an amount exceeding [*the whole amount insured*] to-wit, ... dollars.

V. That the plaintiff duly fulfilled all the conditions of said policy of insurance on his part [and more than sixty days, *or as otherwise required by the policy*, before the commencement of this action, to-wit, on the day of, 19.., at he gave to the defendants due notice and proof of the loss as aforesaid, and duly demanded payment of said sum of dollars].

VI. That no part of the same has been paid, and there is now due from the defendants to the plaintiff thereon the sum of dollars, with interest from, etc.

WHEREFORE, etc.

772. The same, on an open policy.

[*As in preceding form, substituting in paragraph II at the **]: and thereby promised to pay to the plaintiff within days after proof of loss and interest, all loss and damage accruing to

him by reason of the destruction or injury to the ship [or of the cargo, or, certain goods, then laden, or about to be laden upon the ship] then at during its next voyage from to whether by perils of the sea or of fire [*mentioning the perils which occasioned the loss*] or by other causes therein mentioned, not exceeding dollars. [*If the policy provides that the company shall only be liable for such sums as shall be mutually agreed upon and endorsed upon the policy, that fact should be alleged also.*]

773. Upon freight.

[*As in Form 771, substituting at the * in paragraph II the following*]: and thereby insured for him dollars upon freight of certain goods then laden [or about to be laden] in the ship, then at, to be transported by the plaintiff from to against the perils of the seas [*or the perils of fire, mentioning the perils which occasioned the loss*] and other perils in the policy mentioned.

III. That on the day of, 19.., said ship sailed from on the voyage described in the policy, and while proceeding thereon [*or during said voyage, and while lying in the port of, etc.*] said goods, the freight whereof was insured, were lost by [the perils of the sea].

IV. That the plaintiff has not received any freight upon said goods, nor was any earned thereon by reason of [such loss of the vessel]. [*Or, where the freight was paid in advance: That the plaintiff thereupon became liable to repay [and on the day of, 19.., at did repay] to the shippers of said goods, the sum of dollars, freight which had been advanced by them.*]

V and VI. [*As in Form 771.*]

WHEREFORE, etc.

774. Averment of loss by collision.

[*Substitute for paragraph III in preceding forms*]:

III. That on or about the day of, 19.., while the said ship or vessel in said policy named [with the said goods on board] was proceeding on her said voyage, and before her arrival at her said port of destination in the said policy mentioned, another vessel, with great force and violence was carried against and ran foul of the said ship, and the said ship was thereby sunk and lost [with the said goods, which thereby were wholly lost to the plaintiff].

775. Averment of waiver of a condition.

That afterwards [and on the day of, 19.., at] the defendant, by its agents duly authorized thereto, waived the condition of the said policy by which [*designating it*] and released and discharged the plaintiffs from the performance thereof [*or* and consented that the plaintiffs should, etc., *according to the facts*].

776. For a partial loss and contribution to general average.

[*I and II as in preceding forms.*]

III. That said ship did, on the day of, 19.., sail on said voyage, and whilst proceeding thereon was by the perils of the seas dismasted and otherwise damaged in her hull, rigging, and appurtenances; insomuch that it was necessary for the preservation of said ship and her cargo, to throw over a part of said cargo, and the same was accordingly thrown over for that purpose.

IV. That by means thereof the plaintiff was obliged to expend dollars in repairing said ship at; and, also, [*or* and is also liable to pay] dollars as a contribution to and for the loss occasioned by throwing over a part of said cargo.

V. That said ship also suffered much damage that was not repaired at to-wit, to the amount of dollars.

[*Continue as V and VI in Form 771.*]

CHAPTER XXXV.

COMPLAINTS ON LEASES.

777. Lessor against lessee.	782. Assignee of rent against lessee.
778. The same, after re-entry for covenant broken.	783. Heir of reversioner against lessee.
779. Lessor against assignee of lease.	784. Assignee of devisee of reversion and rent against assignee of part of the premises.
780. Lessor against executors of lessee.	
781. Grantee of lessor against lessee.	

777. Lessor against lessee.

I. That heretofore the plaintiff, by an agreement in writing made between him and the defendant, bearing date the day of, 19.., demised and leased to the defendant certain premises therein mentioned [*or very briefly designate them*] at the yearly rent of dollars, and that the defendant thereby covenanted to pay said rent quarterly on the first day of, etc., in each year. [*Or plead the agreement by copy, as follows: That heretofore plaintiff and defendant entered into a certain agreement or lease in writing, of which a copy is hereto attached and made part hereof, marked Exhibit A.*]

II. That the plaintiff has duly performed all the conditions of said agreement on his part.

III. That defendant has not paid the rent accruing under said lease for the [quarter] ending on the day of, 19.., amounting to dollars.

WHEREFORE, etc.

778. The same, after re-entry for covenant broken.

I. That heretofore the plaintiff, by an agreement in writing made between him and the defendant, bearing date the day of, 19.., demised and leased to the defendant certain premises therein mentioned [*or very briefly designate them*] at the yearly rent of dollars, payable quarterly on, etc.; and further covenanted with the plaintiff that he would not [*here state special covenant*] and that in case of any breach on his part of said covenant the plaintiff reserved full power, which was thereby acceded to by the defendant, to re-enter said premises and eject the occupants thereof, and relet the same for the benefit of the defendant.

II. That the defendant, contrary to his covenant [*here state the breach*] and that the plaintiff for that cause re-entered the premises and took possession thereof by virtue of the authority given herein in the lease, and as agent of the defendant, and not otherwise, and that he made diligent efforts to relet the premises for the defendant, but was unable to do so.

III. That thereby the plaintiff lost the sum of dollars rent, which would have been payable to him on, etc.

WHEREFORE, etc.

779. Lessor against assignee of lease.

I. That on the day of, 19.., by a lease in writing then made between this plaintiff and one M.... N...., under the hand and seal of said M.... N.... [of which a copy is annexed as part of this complaint] this plaintiff leased to said M.... N.... certain lands [*or very briefly designate them*] to have and to hold to said M.... N.... and his assigns, from the day of, 19.., for the term of then next ensuing, for the yearly rent of dollars, payable to this plaintiff on the [*state days of payment*] which rent said M.... N.... did thereby for himself and his assigns covenant to pay to the plaintiff accordingly.

II. That by virtue thereof said M.... N.... on the day of, 19.., entered into the demised premises and was possessed thereof.

III. That thereafter and during said term, to-wit, on the day of, 19.. [*naming a day before the breach*] all the estate and interest of said M.... N.... in said term, by an assignment then by him made, became vested in the defendant, who thereupon entered into the demised premises and became possessed thereof [and continued so possessed from thence hitherto, or, until, etc.]

IV. That during the time the defendant was so possessed of the premises, to-wit, on the day of, 19.., the sum of dollars of said rent, for the quarter ending on that day [*or otherwise*] became due to the plaintiff from the defendant, but no part thereof has been paid.

WHEREFORE, etc.

780. Lessor against executors of lessee.¹

I. That on the day of, 19.., by a lease in writing then made between the plaintiff and one M.... N.... un-

¹ This form is taken from Abbott's Forms, Vol. I, Form No. 401, and is supported by Pugsley

v. Aiken, 11 N. Y. 494, which holds that it does not combine distinct causes of action. Under statutes

der the hand and seal of said M.... N.... [of which a copy is annexed as part of this complaint, marked Exhibit A] the plaintiff leased to said M.... N.... certain lands [*or very briefly designate them*] to have and to hold to said M.... N.... and his executors, administrators and assigns, from the day of, 19.., for the term of then next ensuing, for the yearly rent of dollars, payable to this plaintiff on the [*state days of payment*] which rent said M.... N.... did thereby for himself and his executors, administrators and assigns, covenant to pay to the plaintiff accordingly.

II. That by virtue thereof said M.... N.... on the day of, 19.., entered into the demised premises and was possessed thereof.

III. That thereafter and during said term said M.... N.... died, to-wit, on the day of, 19.., leaving a will appointing the defendants his executors.

IV. That the defendants, by an order or determination of the court of the county of duly made on the day of, 19.., were appointed, and now are, the executors of his said will, duly qualified and acting as such.

V. That as such executors the defendants took possession of and occupied the premises under said lease.

VI. That the sum of dollars of said rent for the quarter ending on [*a day before the lessee's death*] became due on said day to the plaintiff from said M.... N.... but no part thereof has been paid.

VII. For a further breach the plaintiff alleges that after the death of said M.... N.... and while defendants were so in possession, the sum of dollars of said rent for the quarter ending on, etc., on that day became due to the plaintiff from the defendants, but no part thereof has been paid.

781. Grantee of lessor against lessee.

I. That one M.... N.... being the owner in fee of certain premises [*or very briefly designate them*] did, on the day of, 19.., by a lease in writing then made between him and the defendant, under the hand and seal of the defendant [a copy of which is annexed as part of this complaint, marked Exhibit A] lease to the defendant said premises from the day of, 19.., for the term of then next ensuing, for the yearly rent of dollars, payable to said M....

requiring presentation of all claims against deceased persons to the probate court, and prohibiting the commencement of actions

against personal representatives, such as prevail in most of the states, this form could not be used.

N.... his heirs and assigns, on the [*state days of payment*] which rent the defendant did thereby covenant to pay to said M.... N.... his heirs and assigns, accordingly.

II. That by virtue thereof the defendant entered into the demised premises and was possessed thereof.

III. That thereafter and on the day of, 19..., said M.... N.... by his deed, under his hand and seal [*a copy of which is hereto annexed*] sold and conveyed to this plaintiff the demised premises [of which the defendant had due notice].

IV. That thereafter, to-wit, on the day of, 19..., the sum of dollars of said rent, for the quarter ending on that day [*or otherwise*] became due to the plaintiff from the defendant; but no part thereof has been paid.

WHEREFORE, etc.

782. Assignee of rent against lessee.

[*I and II as in last preceding form.*]

III. That thereafter, and on the day of, 19..., said M.... N.... duly assigned to the plaintiff said covenant and all his right to the rent therein secured.

IV. [*As in last preceding form.*]

WHEREFORE, etc.

783. Heir of reversioner against lessee.

I. That one M.... N...., now deceased, being in his lifetime the owner in fee of the tenements hereinafter mentioned, on, etc. [*state the lease, and the covenants which were broken, as in the preceding forms*].

II. That the said M.... N.... being seized of the reversion in said demised premises, afterwards, and during the said term, on, etc., died so seized; whereupon the said reversion then descended to the plaintiff as his [son and only child and] heir; and thereby the plaintiff then became seized thereof in fee.

III. That thereafter, to-wit, on, etc., the sum of dollars of said rent, for the quarter ending on that day [*or otherwise*] became due to the plaintiff from the defendant, but no part thereof has been paid.

WHEREFORE, etc.

784. Assignee of devisee of reversion and rent against assignee of part of the premises.

I. That one M.... N.... being the owner in fee of certain premises [*or very briefly designate them*] on the day of, 19..., by lease in writing then made between him and one O.... P.... under the hand and seal of said O.... P....

[a copy of which is annexed as part of this complaint] leased to said O.... P.... said premises from the day of, 19.., for the term of then next ensuing, for the yearly rent of dollars, payable to said M.... N.... his heirs and assigns, accordingly.

II. That by virtue thereof the defendant entered into the demised premises and was possessed thereof.

III. That thereafter and during said term, to-wit, on the day of, 19.., [*naming a day before the breach*] said O.... P.... duly assigned all his interest in a divided part of the land, equal in value to the residue of the demised premises, and thereby the defendant became tenant of such part.

IV. That on the day of, 19.., said M.... N.... died, having by his last will and testament devised the [reversion and] rent to one Q.... R.... which said will was duly proved and recorded as a will of real estate before the surrogate of the county of on, etc.

V. That Q.... R.... on the day of, 19.., duly [conveyed and] assigned said [reversion and] rent to the plaintiff.

VI. That thereafter, to-wit, on the day of, 19.., the sum of dollars of said rent, for the quarter ending on that day [*or otherwise*] became due to the plaintiff from the defendant, but no part thereof has been paid.

WHEREFORE, etc.

CHAPTER XXXVI.

COMPLAINTS ON NON-NEGOTIABLE NOTES OR INSTRUMENTS.

- | | |
|--|--|
| <p>785. Complaint on note payable only in case the maker's business exceeds a certain sum.</p> <p>786. Complaint on a note payable in chattels on demand.</p> <p>787. The same, chattels to be de-</p> | <p>livered at a certain time and place.</p> <p>788. Complaint on note payable on condition.</p> <p>789. Complaint on accepted order payable on condition out of a particular fund.</p> |
|--|--|

785. Complaint on note payable only in case the maker's business exceeds a certain sum.

I. That on the day of, 19.., at, the defendant [for value received, *or*, in consideration of, etc.] made and delivered to the plaintiff his promissory note in writing, of which the following is a copy:

"\$100.00

....., ..., 19..

For value received, I promise to pay to A.... B.... one year after date, one hundred dollars, in case the proceeds of the laundry business I have this day bought of him shall exceed the sum of two thousand dollars within said year.

[Signed] C.... D...."

II. That the proceeds of said laundry business did, before the expiration of said year, exceed the sum of two thousand dollars [of which the defendant, on the day of, 19.., at, had due notice, and payment of said note was then and there duly demanded].

III. That no part of said note has been paid [except, etc.], and there is now due to this plaintiff therein, from the defendant, the sum of dollars, with interest from, etc.

WHEREFORE, etc.

786. Complaint on a note payable in chattels on demand.

I. That on the day of, 19.., at the defendant, for value received [*or, when the consideration is described in the note: for a valuable consideration therein expressed; or, where no consideration is mentioned: for and in consideration of, etc., stating the real consideration, whatever it may have been*], made and delivered to the plaintiff his promiss-

sory note or agreement in writing, of which the following is a copy [*here insert copy of note*].

II. That the plaintiff thereafter duly performed all the conditions of the said agreement on his part, and on the day of, 19.., at, demanded of the defendant payment of said note and delivery of the said [*name property to be delivered*] but that said demand was refused.¹

III. That no part thereof has been paid [except, etc.]

WHEREFORE, etc.

787. The same, chattels to be delivered at a certain time and place.

I. That on the day of, 19.., the defendant made and delivered to plaintiff his promissory note or agreement in writing, of which the following is a copy:

“\$100.00, ..., 19..

Six months after date, for value received, I promise to pay to A.... B.... one hundred dollars in potatoes, at twenty-five cents per bushel, to be delivered at his store in

[Signed] C.... D....”

II. That plaintiff was ready to receive said potatoes at said time and place named in said agreement, and has at all times been ready to receive the same since the said time.

III. That defendant has not delivered said potatoes or any part thereof, and has not paid said sum or any part thereof, and there is now due plaintiff from defendant on said note the sum of dollars, with interest from the day of, 19..

WHEREFORE, etc.

788. Complaint on note payable on condition.

I. That on the day of, 19.., the defendant made and delivered to plaintiff a promissory note in writing, of which the following is a copy:

“\$500.00, ..., 19..

One year after date, for value received, I promise to pay to A.... B.... five hundred dollars, provided [*insert condition*].

[Signed] C.... D....”

¹ If the note be payable on demand, or if it specifies no time or place for delivery of the chattels, demand should be alleged and proven. So also, if any act, such as the selection of the articles, is

to be performed by the promisee, it should be alleged as in this form that the plaintiff has performed all the conditions of the note or agreement on his part.

II. That on the day of, 19.., and within one year from the date of said note, plaintiff did [*here allege performance of condition*].

III. That no part of said note has been paid, and there is due from the defendant to the plaintiff thereon the sum of dollars, with interest from the day of, 19..

WHEREFORE, etc.

789. Complaint on accepted order payable on condition out of a particular fund.

I. That on or about the day of, 19.., one L.... M.... made and delivered to the plaintiff, for a valuable consideration then paid by plaintiff, an instrument in writing, of which the following is a copy [*here insert copy of order, as for instance*]:

“\$100.00 , ... , 19..

Please pay A.... B...., or order, one hundred dollars out of the last payment due from you to me upon that certain building contract now in force between us, and charge the same to my account.

[Signed] L.... M....”

II. That on or about the day of, 19.., the defendant, on presentation of the said order, accepted the same and promised to pay the said sum therein named to the plaintiff as by said order provided.

III. That the last payment from the said C.... D.... to the said L.... M.... upon the building contract named in said order became due on or about the day of, 19.., and is still due and amounts to more than the said sum of one hundred dollars.

IV. That prior to the commencement of this action plaintiff demanded of said defendant payment of the said sum of one hundred dollars upon the said order, but that said defendant refused and still refuses to pay the said sum or any part thereof, and no part of the same has been paid.

WHEREFORE, etc.

CHAPTER XXXVII.

COMPLAINTS ON CONTRACTS OF SUBSCRIPTION.

- | | |
|--|---|
| 790. Complaint on subscription to build a church or other public building. | 792. On stock subscription made before incorporation. |
| 791. Complaint on a subscription to a bonus fund to secure the building of a mill. | 793. On stock subscription made after incorporation. |

790. Complaint on subscription to build a church or other public building.

I. That on the day of, 19.., the plaintiff was and now is a corporation duly organized under the laws of the state of for the purpose of [*state purposes of corporation*].

II. That the plaintiff, in the year was erecting [*or about to erect*] a building at for the purpose of use as a church [*or other purpose*].

III. That the defendant, to enable the plaintiff to complete said building, and in consideration of the like agreement and subscriptions of other parties, subscribed and promised in writing to pay the plaintiff the sum of dollars for that purpose [*or attach copy of subscription agreement*].

IV. That relying upon said subscription of the defendant, the plaintiff let the contract for the completion of said building, and completed the same, and thereby expended the sum of dollars and incurred liabilities to the amount of dollars, and has duly performed all the conditions thereof on its part to be performed.

V. No part of the defendant's subscription has been paid, although demand therefor was duly made before the action, and there is now due from the defendant to the plaintiff thereon the sum of dollars.

WHEREFORE, etc.

791. Complaint on a subscription to a bonus fund to secure the building of a mill (Adapted from *S. C. L. Co. v. Bickford*, 93 Wis. 220).

I. That on the day of, 19.., the C.... D.... company was and still is a corporation duly authorized and existing under the laws of the state of for the purpose of manufacturing and selling flour [*or otherwise state objects of*]

corporation] and duly authorized to make the contracts and agreements hereinafter set forth.

II. That on said date the said C.... D.... company offered and proposed to the plaintiff and certain other citizens of the city of Superior that if there should be subscribed and paid to it by the said plaintiff and others a bonus or fund of fifty thousand dollars on or before, 19.., the said company would erect or cause to be erected at or near in the city of a flouring mill of the capacity of barrels per day [*or state fully offer according to the facts*].

III. That thereafter the plaintiff duly accepted said proposition and proceeded to obtain subscriptions to pay said bonus, and that the defendant on the day of, 19.., for the purpose of assisting in the raising of said bonus fund and procuring the erection of said mill in writing subscribed and agreed to pay to the said C.... D.... company toward said bonus the sum of dollars, and that on and prior to the day of, 19.., the entire amount of said bonus fund was duly subscribed by solvent subscribers, and that defendant's said subscription formed a part thereof.

IV. That the said written subscriptions so made were duly delivered to the said C.... D.... company and that thereupon and in reliance upon said subscriptions the said C.... D.... company proceeded to erect said mill at the place and of the capacity required by its said offer and fully complied with the terms of its said offer, and said mill was fully completed on and before the day of, 19...

V. That said sum of dollars became due to the said C.... D.... company on the day of, 19.., and that on said day the said company duly demanded payment by the defendant of said sum of dollars, but the payment thereof was refused and the same remains wholly due and unpaid.

VI. That on the day of, 19.., the said C.... D.... company for value sold and assigned in writing to this plaintiff its said claim against the defendant, and said claim is now owned by this plaintiff.

WHEREFORE, etc.

792. On stock subscription made before incorporation.

I. That the plaintiff is a corporation duly organized under the laws of and incorporated for the purpose of [*state purpose*].

II. That prior to and in contemplation of the said incorporation of plaintiff the defendant on or about the day of, 19.., subscribed and agreed to take and pay for

shares of capital stock in the said corporation when duly formed, at the par value of dollars per share, which said subscription agreement was in writing and a copy thereof is hereto attached and marked Exhibit A.

III. That relying upon the said subscription so made by the defendant a large number of other persons subscribed for and agreed to take and pay for shares of capital stock in the plaintiff corporation and the plaintiff was thereafter duly organized and incorporated.

IV. That the plaintiff, by resolution of its directors at a regular meeting thereof held on or about the day of, 19.., duly required the defendant to pay to the treasurer of plaintiff within days after notice of said resolution the sum of dollars so subscribed by the defendant for capital stock of the plaintiff.

V. That plaintiff on or about the day of, 19.., duly notified the defendant of the passage of said resolution and demanded payment of said subscription, but that no part of said sum of dollars has been paid by the defendant.

WHEREFORE, etc.

793. On stock subscription made after incorporation.

I. [*Allege incorporation of plaintiff as in last preceding form*]. That by plaintiff's articles of incorporation it was and is provided that its capital stock should consist of shares of the par value of dollars each.

II. That on or about the day of, 19.., the board of directors of plaintiff, at a regular meeting thereof, opened books of subscription to such capital stock, and thereupon, upon said day the defendant duly subscribed and agreed to take shares of plaintiff's capital stock [payable on or before the day of, 19..] and then and there paid to plaintiff the sum of dollars, being per cent of his said subscription.

III. [*If subscription fixed no time for payment add*]: That thereafter, and on or about the day of, 19.., at a regularly called meeting of the board of directors of plaintiff, at which a majority thereof were present, the following resolution was adopted [*insert copy of resolution calling for payment*].

IV. That plaintiff has duly performed all the conditions on its part, and on or about the day of, 19.., gave defendant due notice of the passage of said resolution, and demanded payment as in said resolution provided, but that defendant has paid no part of said sum and more than days have elapsed since said notice and demand were given.

WHEREFORE, etc.

CHAPTER XXXVIII.

COMPLAINTS IN ACTIONS ON JUDGMENTS.

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| <p>794. General form, upon domestic judgment.</p> <p>795. The same, by an assignee.</p> <p>796. Complaint on a foreign judgment of a court of general jurisdiction.</p> <p>797. Complaint on a foreign judgment of an inferior tribunal.</p> | <p>798. Complaint on a foreign judgment for alimony in a divorce action.</p> <p>799. Complaint on judgment of justice of the peace in an action brought within five years after its rendition.</p> |
|--|--|

794. General form, upon domestic judgment.¹

I. That on the day of, 19... , at in the court of county, [*or* before M.... N.... a justice of the peace in and for the town of, etc.] the plaintiff recovered a judgment, which was duly given by said court [*or* justice] against the defendant, for dollars, in an action wherein this plaintiff was plaintiff [*or* defendant], and the defendant herein was defendant [*or* plaintiff].

II. That no part thereof has been paid [except, etc.]
WHEREFORE, etc.

¹ In most, if not all, of the code states it is not necessary to state the facts which show that the court rendering the judgment had jurisdiction and authority over the subject matter and person, but it is sufficient to state generally that such judgment was duly given or made. Wis. Stats. 1898 sec. 2673; Minn. Rev. Laws 1905 sec. 4146; Iowa Code sec. 3625; N. Dak. Rev. Codes sec. 5285; S. Dak. Rev. Codes C. P. sec. 138; Cobbe's Ann. Stats. of Neb'r. sec. 1127. Under these provisions this form will generally be found entirely sufficient as to any domestic judgment, whether rendered in a court of general or limited jurisdiction. In *Archer v. Romaine*, 14 Wis. 375, it was held that the sec-

tion referred to in this note applies to judgments in courts of special jurisdiction in other states as well as to domestic judgments. While this case has not been overruled, it does not seem to agree with the reasoning in *Jarvis v. Robinson*, 21 Wis. 523, and it would undoubtedly be safer, in case of suit upon a foreign judgment rendered by a justice of the peace or other judicial tribunal of limited jurisdiction, to allege the facts showing the jurisdiction, as in later forms in this chapter.

In most of the code states also there are provisions requiring leave of the court to be obtained prior to the bringing of an action upon a domestic judgment rendered by a court of record. Wis.

795. The same, by an assignee.

I. That on the day of, 19.., at in the court of county [*or before M.... N.... a justice of the peace in and for the town of, etc.*] one O.... P.... recovered a judgment which was duly given by said court [*or justice*] against the defendant, for dollars, in an action wherein the said O.... P.... was plaintiff, and the defendant the defendant [*or otherwise, as the case was*].

II. That thereafter [*or, on the day of, 19.., at*] said M.... N.... duly assigned said judgment to this plaintiff [*of which the defendant had due notice*].

III. That no part thereof has been paid [*except, etc.*]

WHEREFORE, etc.

796. Complaint on a foreign judgment of a court of general jurisdiction.²

I. That at the times hereinafter mentioned the circuit court of the county of of the state of was a court of general jurisdiction, duly created by the laws of that state.

II. That on or about the day of, 19.., the plaintiff commenced an action in said court against the defendant by the issue of summons [*or other process*] which summons was duly and personally served on the defendant [*or in which action the defendant voluntarily and duly appeared in person, or by attorney*].

III. That such proceedings were thereupon had, that on the day of, 19.., in said action the plaintiff recovered judgment, which was duly given by said court against the defendant, for the sum of dollars.

IV. That no part thereof has been paid [*except, etc.*]

WHEREFORE, etc.

797. Complaint on a foreign judgment of an inferior tribunal.

I. That at the times hereinafter mentioned M.... N.... was a justice of the peace in and for the town of in the county of and state of, having authority under

Stats. 1898 sec. 2916; Minn. Rev. Laws 1905 sec. 4343; Iowa Code sec. 3439; N. Dak. Rev. Codes sec. 5182; S. Dak. Rev. Code C. P. sec. 37. Where such leave is required it is necessary to state in the complaint the fact that leave was obtained. *Farish v. Austin*, 25 Hun, 430; *Watts v. Everett*, 47 Iowa 269.

² This form may be used where the title of the foreign court is not such as to indicate that it is a court of general jurisdiction. If, however, the title of the court is one indicating general jurisdiction, such as circuit court, it is unnecessary to allege jurisdictional fact. *Kunze v. Kunze*, 94 Wis. 54.

and by virtue of an act of said state, entitled [*give title of act*] passed on the day of, 19.., to hold court, and having jurisdiction as such over actions of [*state the jurisdiction sufficiently to make it appear that it included the cause in question*].

II. That on the day of, 19.., at aforesaid, the plaintiff commenced an action against the defendant before the said justice, by summons [*or other process*] duly issued by said justice on that day, for the recovery of [*here designate the cause of action sufficiently to show it to be within the jurisdiction*], which summons was duly and personally served on the defendant [*or, in which action the defendant voluntarily and duly appeared*].

III. That such proceedings were thereupon had, that on the day of, 19.., in said action the plaintiff recovered judgment, which was duly given by said justice against the defendant, for the sum of dollars, to-wit, ... dollars for said debt [*or damages*] and dollars costs.

IV. That no part thereof has been paid [*except, etc.*]

WHEREFORE, etc.

798. Complaint on a foreign judgment for alimony in a divorce action.*

I. That at the time hereinafter mentioned the circuit court in and for the county of Cook, in the state of Illinois, was a court of general jurisdiction over matters in equity and law, duly created and organized by the laws of that state.

II. That on the day of, 19.., the plaintiff commenced an action for divorce in said court against the defendant; that said defendant was duly served with process therein and on the day of, 19.., appeared in said action and submitted himself personally to the jurisdiction of the court.

III. That thereafter such proceedings were had therein in said court that on the day of, 19.., a decree was duly made, entered, enrolled and docketed in said court dissolving the bonds of matrimony between this plaintiff and said defendant, and thereafter, on the day of, 19.., by the consideration and judgment of said court, the said decree was duly amended by adding thereto and making a part thereof a provision and clause that said defendant pay to this plaintiff alimony to the amount of dollars, with dollars in addition thereto as solicitor's fees, and that such money

* Adapted from *Kunze v. Kunze*, 94 Wis. 54.

should be so paid within . . . days thereafter, and should stand when paid as a satisfaction in full for all claims for alimony and solicitor's fees on the part of this complainant. And the said plaintiff avers that no part of such sums of money have been paid.

IV. Complaining further, the said plaintiff avers: That under and by virtue of the provisions of the Revised Statutes of the State of Illinois of 1874, Chapter 22, entitled "Chancery," and Chapter 40, entitled "Divorce," such decree, as amended, so entered as aforesaid, has the force and effect of a judgment at law for the payment of money. That such is the construction thereof, and the force and effect to be given to the same, has been adjudicated and determined by the supreme court of said state, and such is the law of said state.

V. That by reason thereof this plaintiff is advised and believes that, under and by virtue of the constitution of the United States, Section 1, Article IV, she hath a good right to maintain her cause of action aforesaid in the courts of the state of Wisconsin, to have and recover of the said defendant the said sums of money so awarded to her as aforesaid, and that the said courts will give the same force and effect to said decree so above stated as is given thereto in the state of Illinois.

WHEREFORE, etc.

799. Complaint on judgment of justice of the peace in an action brought within five years after its rendition.⁴

[*Allege rendition of the judgment, etc., as in the first two forms in this chapter, and then allege*]: That the said M. . . . N. . . . the justice of the peace by whom said judgment was rendered died [*or resigned, or removed from the said county of*] on or about the . . . day of , 19. . . , [*or set forth the happening of any other fact named in the statutes cited in the note to this form, which authorize the bringing of an action within five years after the rendition of the first judgment*].

[*Add allegation of non-payment and demand of judgment*].

⁴In several of the states there are provisions prohibiting the bringing of actions upon a judgment rendered by a justice of the peace of the same county within five years after the rendition thereof except in case of the death, resignation or removal of the justice from the county or

some other cause named in the statute. Wis. Stats. 1898 sec. 3668; Iowa Code sec. 3439; S. Dak. Rev. Code C. P. sec. 37. In such cases the fact which by the terms of the statute it is necessary to establish in order to entitle the action to be brought should be distinctly alleged.

CHAPTER XXXIX.

COMPLAINTS FOR BREACH OF COVENANT.

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| <p>800. On a covenant against incumbrances on land.</p> <p>801. The same, one incumbrance being excepted in deed.</p> <p>802. On a covenant for quiet enjoyment.</p> <p>803. On a covenant of seisin or of right to convey.</p> <p>804. On a covenant of warranty for failure of title.</p> <p>805. The same, for deficiency in quantity.</p> <p>806. On grantee's covenant to build.</p> | <p>807. On a covenant against nuisances.</p> <p>808. On a covenant to maintain a fence.</p> <p>809. Against tenant on a covenant to keep in repair.</p> <p>810. Against landlord on a covenant to keep in repair.</p> <p>811. Against landlord for breach of covenant of quiet possession.</p> <p>812. Against landlord for breach of covenant to complete building.</p> |
|---|--|

800. On a covenant against incumbrances on land.¹

I. That on the day of, 19..., the defendant [and M.... his wife] for a valuable consideration, by deed conveyed to the plaintiff in fee simple a farm in the town of, county of [*or otherwise briefly designate the property and the estate therein conveyed*].

II. That said deed contained a covenant on the part of the defendant, of which the following is a copy: [*copy of covenant*] [*or, whereby he covenanted, etc., stating its substance*].

III. That at the time of the making and delivery of said

¹ The complaint should describe particularly the incumbrance and show that it existed at the time of the commencement of the action; it is not sufficient simply to negative the words of the covenant. *Julian v. Burgott*, 11 Johnson 6. It is not necessary to allege compulsion by suit. *Prescott v. True-man*, 4 Mass. 627. The measure of damage is the amount paid to remove the incumbrance. *Foote v. Burnett*, 10 Ohio St. 317. If it has not been paid nominal damages only are recoverable. An outstanding lease is an incum-

brance. *Fritz v. Pusey*, 31 Minn. 368 s.c. 18 N. W. 94. So also is the existence of the right of way of a railway company over the land. *Jerald v. Ely*, 51 Iowa, 321 s.c. 1 N. W. 639. The grantee's knowledge of existing incumbrances will not defeat his right to recover. *McGowen v. Myers*, 60 Iowa, 256 s.c. 14 N. W. 788. Except in case of a known highway. *Burbach v. Schweinler*, 56 Wis. 386 s.c. 14 N. W. 449; *Bennett v. Keehn*, 67 Wis. 154 s.c. 30 N. W. 112.

deed the premises were not free from all incumbrance, but * on the contrary were subject to the [inchoate] right of dower of one E.... F...., wife [or widow] of one G.... H.... the former owner of the premises.

IV. And for a further breach the plaintiff alleges that on the day of, 19.., one J.... K.... recovered a judgment of dollars, which judgment was on the day of, 19.., docketed in said county of [*the county where the premises are situated*] and which judgment at the time of the execution and delivery of the deed remained unpaid and unsatisfied of record.

V. And for a further breach the plaintiff alleges, that at the time of the execution and delivery of said deed the premises were subject to a tax theretofore duly assessed, charged and levied upon the said premises by the said city of and the officers thereof, of the sum of dollars, and which tax was then remaining due and unpaid and was at the time of the delivery of said deed a lien and incumbrance by law upon the said premises.

VI. That by reason thereof plaintiff was obliged to pay and did on the day of, 19.., pay the sum of dollars in extinguishing the right of dower [or the lien of the judgment, or, the tax, or all of them] aforesaid.

WHEREFORE, etc.

801. The same, one incumbrance being excepted in deed.

I. [*As in preceding form.*]

II. That by said deed the premises conveyed were described as being subject, nevertheless, to the payment of a certain mortgage [or other incumbrance, describing it by date, names of parties, amount, and the place of record, as in the deed] and no other grants, titles, charges, estates, judgments, taxes, assessments or incumbrances were mentioned or specified in said deed as existing upon or affecting, or incumbering said premises or the title thereto.

III. That said deed contained a covenant on the part of the defendant by which he, for himself, his heirs, executors and administrators, covenanted and agreed to and with the plaintiff, his heirs and assigns, that the said premises then were free, clear, discharged and unincumbered of and from all other and former grants, titles, charges, estates, judgments, taxes, assessments and incumbrances of what nature or kind soever, except as above; meaning, except the mortgage aforementioned [*or set forth a copy of the covenant, as in preceding form*].

IV. That at the time of the making and delivery of the said

deed the premises were not free from all incumbrances other than the mortgage therein excepted, but [*continue as in preceding form from the **].

WHEREFORE, etc.

802. On a covenant for quiet enjoyment.²

I. That on the day of, 19..., the defendant [and M.... his wife] for a valuable consideration by deed conveyed to the plaintiff in fee simple a farm in the town of county of [*or otherwise briefly designate the property and the estate therein conveyed*].

II. That said deed contained a covenant on the part of the defendant, of which the following is a copy: [*copy of covenant*] [*or, whereby he covenanted, etc., stating its substance as in the preceding form*].

III. That plaintiff has not been permitted peaceably to occupy and enjoy said premises, or to receive the rents and profits thereof, but on the contrary, on the day of, 19..., one E.... F.... who at the time of making said deed and continually from thence until the time of the eviction hereinafter mentioned was the lawful owner [*or, lawfully entitled to possession*] of said premises, entered into the same and ejected and removed the plaintiff by due process of law from the possession and occupation of the same [*or if only a part designate what part*] with the appurtenances, and has ever since kept him out of the same.

IV. That by reason thereof the plaintiff has not only lost said [part of the] premises, but also the sum of dollars, by him laid out and expended in and upon the said premises in repairing and improving the same, and has also been obliged to pay the sum of dollars costs and charges recovered by the said E.... F.... in his action for the recovery of said premises, and the sum of dollars for his own costs, charges and counsel fees in defending said action.

WHEREFORE, etc.

² Actual ouster or eviction by paramount legal title, describing such title, should be alleged. Rickert v. Schneider, 9 Wend. 416; Real v. Hollister, 20 Nebr. 112 s.c. 29 N. W. 189. It is not necessary that the eviction be under legal process or judgment; it is sufficient if the grantee yields

under demand of the holder of the paramount title. Ogden v. Ball, 40 Minn. 494 s.c. 41 N. W. 453. However, if he yields possession without suit he will be obliged in an action upon the covenant to prove the fact that the title which he yielded was paramount. Ogden v. Ball, *supra*.

803. On a covenant of seisin or of right to convey.³

I. That on the day of, 19.., the defendant [and M.... his wife] for a valuable consideration by deed conveyed to the plaintiff in fee simple a farm in the town of county of [*or otherwise briefly designate the property and the estate therein conveyed*].

II. That said deed contained a covenant on the part of the defendant, of which the following is a copy: [*copy of covenant*] [*or, whereby he covenanted, etc., stating its substance*].

III. That at the time of the execution and delivery of said deed the defendant was not the true, lawful and rightful owner, etc. [*negating the words of the covenant*].

IV. And for a further breach of the said covenant plaintiff alleges that at said time the defendant had not in himself good right, full power, etc. [*negating the words of the covenant*] whereby plaintiff has sustained damage dollars.

WHEREFORE, etc.

804. On a covenant of warranty for failure of title.⁴

I. That on the day of, 19.., the defendant [and M.... his wife] for a valuable consideration by deed conveyed to the plaintiff in fee simple a farm in the town of county of [*or otherwise briefly designate the property and the estate therein conveyed*].

II. That said deed contained a covenant on the part of the defendant, of which the following is a copy: [*copy of covenant of warranty, or allege its substance*].

³ The covenant of seisin runs with the land. *Mecklem v. Blake*, 22 Wis. 495. In an action for breach of the covenant of seisin eviction must be alleged if the grantee was put in possession, but where the grantee has no title at the time of the grant the covenant is broken as soon as made, and eviction is not necessary. *Zent v. Picken*, 54 Iowa, 525 s.c. 6 N. W. 750.

⁴ Where the grantee is kept out of possession by one holding under paramount title at the time of the grant, the covenant is broken. In such case omit paragraphs III and IV from the form and insert:

III. That the defendant has not warranted and defended the premises to this plaintiff, but on the

contrary, at the time of the making and delivery of said deed, one E.... F.... was seized and possessed of the premises, lawfully claiming the same by an elder and better title, and then lawfully held and still holds this plaintiff out of possession thereof, to his damage dollars.

Actual eviction must be alleged and such eviction must be alleged to have been under paramount title. *Eaton v. Lyman*, 30 Wis. 41. If such eviction be by judgment in an action against the grantee, such judgment will not bind the grantor unless timely notice and opportunity to defend was given to him. *Somers v. Schmidt*, 24 Wis. 417.

III. That the plaintiff afterwards lawfully entered upon the premises and became seized thereof accordingly.

IV. That the defendant has not warranted and defended the premises to the plaintiff, but on the contrary on the day of, 19.., one E.... F.... who at the time of making said deed had and ever since until the last mentioned day continued to have lawful right to the premises by an elder and better title, lawfully entered the premises and ousted the plaintiff thereof and still lawfully holds him out of the same, to his damage dollars.

[*Or, where the eviction was by recovery at law*]:

IV. That defendant has not warranted and defended the premises to the plaintiff, but on the contrary one E.... F.... lawfully claiming the same premises by an elder and better title, afterwards, in an action brought by him in the court, held at in which said M.... N.... was plaintiff and this plaintiff was defendant [*and of which action due notice was given to the said defendant in this action*], did, on the day of, 19.., recover judgment, which was duly given by said court against this plaintiff for his seisin and possession of the premises and afterwards and on the day of, 19.., [*by virtue of a writ of execution duly issued thereon*] lawfully entered the premises and ousted the plaintiff thereof, and still lawfully holds him out of the same, to his damage dollars.

WHEREFORE, etc.

805. The same, for deficiency in quantity.

I. That on the day of, 19.., the defendant [and M.... his wife] for a valuable consideration by deed conveyed to the plaintiff [in fee simple] a farm in the town of county of in said deed bounded and described as follows: [*copy of description*].

II. That said deed contained a covenant on the part of the defendant, of which the following is a copy: [*copy of covenant, or: whereby he covenanted, etc., stating its substance*].

III. That the said farm contained only sixty acres of land, instead of ninety acres, as described and warranted in said deed, to the plaintiff's damage dollars.

WHEREFORE, etc.

806. On grantee's covenant to build.

I. That in consideration that the plaintiff would sell and convey to the defendant a lot of land [*very briefly designate it*] for the sum of dollars, the defendant, on or about the

.... day of, 19.., undertook and promised plaintiff [by his covenant] that he would erect upon the premises a good brick dwelling house, to be occupied as such, and that he would not erect upon the premises any building that would be a nuisance to the vicinity of the premises.

II. That the plaintiff did accordingly sell and convey to the defendant said premises for said sum, but the defendant has not erected a good brick dwelling house on the lot, to be occupied as such, but on the contrary has suffered it to lie open and uninclosed [*or, but on the contrary has erected, etc., stating what*].

III. That said lot was a part of a considerable tract of land which the plaintiff laid out into lots and offered for sale for the purpose of the erection of dwelling houses, requiring each purchaser to covenant to erect a dwelling house, and that the erection of such dwelling house on lots sold improved the residue of the lots belonging to the plaintiff and increased their value and their market price.

IV. That the defendant's violation of this covenant has prevented other lots in the vicinity from becoming valuable to the plaintiff, as they would otherwise have done, and has injuriously affected their condition and hindered the plaintiff from selling them, to his damage dollars.

WHEREFORE, etc.

807. On a covenant against nuisances.

I. That on the day of, 19.., at the plaintiff by his deed conveyed to the defendant for a valuable consideration, as well as in consideration of the covenant hereinafter mentioned, a lot of land [*very briefly designating it*].

II. That said deed contained a covenant on the part of the defendant, the grantee therein, of which the following is a copy: [*copy of the covenant against nuisances*].

III. That said deed was delivered by the plaintiff to the defendant and by him duly accepted, and he became thereby the owner of the premises and bound by the covenant aforesaid.

IV. That the defendant has erected, or suffered or permitted to be erected, on said premises, a building occupied in a manner which is a nuisance to the vicinity of the premises, to-wit, a building erected for and used as a slaughter house.

V. That the offal and blood in and carried out from said slaughter house and the offensive smell created thereby is a nuisance to the vicinity of the said premises and to the plaintiff, whose house is adjoining, to his damage dollars.

WHEREFORE, etc.

808. On a covenant to maintain a fence.

I. That on the day of, 19.., the plaintiff and defendant then being owners of lands adjoining, made an agreement in writing, under their hands and seals, and thereby the defendant covenanted to erect a fence upon the boundary line between the said lands of the plaintiff and those of the defendant, and to maintain the same and keep the same in constant repair [*or, an agreement, of which a copy is hereto annexed as a part of this complaint*].

II. [*If there are any conditions on the part of the plaintiff they should be set forth, unless the whole agreement is annexed; and add: That the plaintiff duly performed all the conditions thereof on his part*].

III. That the defendant did not, after the erection of said fence, maintain the same and keep it in continual repair, but on the contrary in the month of, 19.., he suffered the same to become dilapidated and broken down and to remain in that condition from that time ever since [*or, until the day of, 19..*].

IV. That by means thereof the plaintiff suffered great damage by the injury to his lands and crops thereon, and his garden and fruit trees, by cattle coming through said broken down fence from the defendant's land upon his premises, and that he was compelled to repair and rebuild said fence in order to protect his land from the cattle coming from defendant's land, to his damage dollars.

WHEREFORE, etc.

809. Against tenant on a covenant to keep in repair.

I. That on the day of, 19.., by a lease in writing then made between the plaintiff and defendant, under their hands and seals [*or under the hand and seal of the defendant*] the plaintiff leased to the defendant for one year from said date, at a yearly rent of dollars, a certain dwelling house, with stable and sheds attached, in the village of in the county of the property of the plaintiff, the same being upon a part of the estate of M.... N.... deceased [*or otherwise briefly designate the premises*].

II. That said lease contained a covenant on the part of the defendant, of which the following is a copy: [*copy of the covenant*]. [*Or: II. That the defendant in said lease covenanted that he would, during the term of one year, at his own cost and expense, keep said dwelling house and premises in good repair, and at the expiration of said term leave the said dwelling house*

and premises in as good condition as he received the same, reasonable wear and tear excepted].

III. That the defendant entered upon the premises and occupied the same during the said term of one year under said agreement; but that he has failed to keep the said house and premises in good repair, but on the contrary he has left them in such condition that the fences are broken down, the walls and the roof admit the water and in consequence the plastering has in many places fallen down, the window glass is broken [*or other injuries*] and the house and premises are otherwise injured by reason of the neglect of the defendant to keep them in good repair pursuant to his said agreement, to the damage of the plaintiff dollars.

WHEREFORE, etc.

810. Against landlord on a covenant to keep in repair.

I. That on the day of, 19.., by a lease in writing then made between the plaintiff and defendant under their hands and seals [*or, under the hand and seal of the defendant*] the defendant leased to the plaintiff the premises known as No., ... street, in the city of for one year from that date, at the yearly rent of dollars.

II. That said lease contained a covenant on the part of defendant, of which the following is a copy: [*copy of covenant to keep in repair*].

III. That the plaintiff entered into possession of said premises under said lease and used the same as a store and warehouse for storing and selling various articles of drygoods.

IV. That the defendant has failed to perform said covenant and keep the premises in repair, and has allowed the walls and roof to become and remain leaky, by means whereof the water has entered said premises and utterly ruined a portion of his said goods and seriously injured others, to the damage of the plaintiff dollars.

WHEREFORE, etc.

811. Against landlord for breach of covenant of quiet possession.

I. That on the day of, 19.., the plaintiff and defendant entered into an agreement under their hands and seals [*or, under the hand and seal of the defendant*] whereby the plaintiff hired and the defendant leased for the term of years from said date, at a yearly rent of dollars [*here briefly designate the premises*].

II. That said lease contained a covenant on the part of the

defendant, of which the following is a copy: [*copy of covenant for quiet possession*]. [Or: II. That the defendant in said lease covenanted with the plaintiff that he should peaceably and quietly occupy and enjoy the premises aforesaid for the said term of years.]

III. That the plaintiff has not been permitted peaceably to occupy and enjoy the possession of said premises, but on the contrary after the commencement of the term and on the day of, 19.., one E.... F.... who was at the time of making said lease and thereafter until the last mentioned day the lawful owner [*or, lawfully entitled to the possession*] of said premises, entered upon the same and ejected this plaintiff therefrom and has ever since kept him out of possession of the same [*or designate what part*] to his damage dollars.

IV. [*Allege special damage, if any, e. g., as follows*]: That the plaintiff, confiding in the covenant of the defendant aforementioned, had purchased a number of farming utensils and implements of husbandry for the cultivation of said premises, and had entered upon said premises and commenced to raise grain and fruit thereon when he was so ejected; and that by reason of the defendant's failure to fulfill said covenant, said farming utensils and implements became of little or no value to him, and he was deprived of the result of his time and labors in cultivating said premises, to the damage of the plaintiff dollars. [Or: IV. That plaintiff was thereby prevented from continuing his business of a hatter at the place, and compelled to expend dollars in removing therefrom, to his damage dollars].

WHEREFORE, etc.

812. Against landlord for breach of covenant to complete building.

I. That on the day of, 19.., at, the said plaintiffs entered into an agreement in writing with the defendants under the firm name of A.... B.... & Co., and by the defendants under the firm name of C.... D.... & Co., of which agreement the following is a copy [*copy agreement*].

II. That after the making of this agreement and on or about the day of, 19.., defendants delivered and plaintiffs took possession of the first floor and basement of said building, under and in pursuance of said agreement, no lease or other agreement having been made or executed between the parties; and that the plaintiffs took possession thereof upon the faith and assurance of defendants, and full belief thereof, that the said premises were finished in the same manner as the store then

occupied by E.... F.... in the same street, and in accordance with the terms of said agreement.

III. That said premises were not finished in the same manner as the store at the time of making such agreement, occupied by E.... F.... in the same street, but on the contrary thereof the roof of the building and the gutters, water-courses and leaders therefrom were constructed and finished in a different and less perfect manner than those upon that store, and an obstruction was placed over the top of the leader that conducted the water from the said roof of the building, which obstructed and prevented the water from passing off from said roof, whereas no such obstruction was placed over the top of the leader or gutter or water-course from the roof of the store then occupied by said E.... F.... in the same street.

IV. That in consequence thereof the water falling upon the roof of said building mentioned in said agreement was obstructed and prevented from passing off through the gutters, water-courses or leader, and was forced back upon and ran through the skylight in the roof and down into the said first floor and basement and upon the silks, goods, wares and merchandise of the said plaintiffs kept therein, and greatly injured the same, to the damage of the plaintiffs dollars.

WHEREFORE, etc.

CHAPTER XL.

COMPLAINTS FOR BREACH OF CONTRACT OF EMPLOYMENT.

- | | |
|---|--|
| 813. By employee wrongfully discharged. | 820. Against a builder for not well finishing a building. |
| 814. By employer against employee refusing to serve. | 821. Against an attorney for negligent prosecution of an action. |
| 815. By apprentice against master. | 822. The same, for negligent defense. |
| 816. By master against father of apprentice. | 823. The same, for negligence in examining a title. |
| 817. For breach of contract to manufacture goods. | 824. Against a physician for malpractice. |
| 818. For goods made on defendant's order, not accepted. | 825. Against a surgeon for malpractice. |
| 819. Against a builder for not completing building. | |

Where an employee under an entire contract wrongfully terminates it he cannot recover either on the contract or upon *quantum meruit* for services rendered up to the time of such termination. If he be discharged, however, or wrongfully prevented by his master from rendering full performance he can recover upon the contract for the services rendered prior to such discharge at the contract rate, and also his damages for not being allowed to complete the contract; not exceeding, however, the full amount he could have earned by completing the contract; these damages being subject to reduction by proof that the employee might reasonably have earned wages during such time. In case the employee was rightfully discharged he may still recover for the services actually rendered, subject, however, to the employer's right to recoup such damages as he is legally entitled to by reason of the facts which rendered the discharge justifiable. *Hildebrand v. American Fine Art Co.*, 109 Wis. 171.

813. By employee wrongfully discharged.

I. That on the day of, 19.., at, plaintiff and defendants made an agreement in writing, of which a copy is annexed and made a part of this complaint, marked Exhibit A [*or*, made an agreement whereby the plaintiff undertook to render his services to the defendant as bookkeeper, *or*, as

salesman, *or*, as teacher, *etc.*, *as the case may be*, from said date to the day of, 19.., in consideration whereof the defendants agreed so to employ the plaintiff during said period and to pay him for his services at the rate of dollars each month].

II. That the plaintiff [entered upon his employment under said agreement and duly discharged all the duties thereof until the day of, 19.., and he] has ever since been and still is ready and willing [and on the day of, 19.., duly offered] to perform all the conditions of said agreement upon his part.

III. That the defendant then refused and still refuses to allow him to do so, or to pay him therefor, to his damage dollars.

WHEREFORE, *etc.*

814. By employer against employee refusing to serve.

I. That on the day of, 19.., at the plaintiff and defendant made an agreement in writing, of which a copy is annexed and made part of this complaint, marked Exhibit A [*or*, made an agreement whereby the defendant agreed to render his services to the plaintiff as bookkeeper, *or*, as salesman, *or* as teacher, *etc.*, *as the case may be*, from said date to the day of, 19..; in consideration whereof the plaintiff agreed so to employ the defendant during said period, and to pay him for his services at the rate of dollars each month].

II. That the plaintiff [has ever been ready and willing to employ the defendant, and on the day of, 19.., offered to do so; and has otherwise] duly performed all the conditions thereof on his part.

III. That the defendant entered upon the service of the plaintiff on the above mentioned day, but afterwards, on the day of, 19.., he refused to serve the plaintiff as aforesaid; to his damage dollars. [*Or, where the defendant refused to commence service:* III. That the defendant wholly refused to perform said agreement, to the plaintiff's damage dollars].

WHEREFORE, *etc.*

815. By apprentice against master.

I. That on the day of, 19.., at the defendant, with his [father E.... F....] made an indenture under his hand and seal with the plaintiff, a copy of which is annexed and made part of this complaint, marked Exhibit A.

II. That the plaintiff has duly performed all the conditions thereof on his part.

III. That the defendant has not instructed the plaintiff in the business of according to his covenant, to his damage dollars.

IV. And for a further breach the plaintiff alleges that the defendant has not allowed or provided for the plaintiff meat, drink, washing, lodging and other necessities according to his covenant, to his damage dollars.

WHEREFORE, etc.

816. By master against father of apprentice.

I. That on the day of, 19.., at E.... F.... [the apprentice] with the consent of the defendant, made an indenture under his hand and seal, a copy of which is annexed, as a part of this complaint, and marked Exhibit A.

II. That at the same time and place the defendant made an agreement under his hand and seal, a copy of which is also annexed as a part of this complaint and marked Exhibit B.

III. That the plaintiff duly performed all the conditions of said indenture and agreement on his part.

IV. That from and ever since the day of, 19.., the said E.... F.... has willfully absented himself from the service of the plaintiff, to the damage of the plaintiff dollars.

WHEREFORE, etc.

817. For breach of contract to manufacture goods.

I. That on the day of, 19.., at the defendant promised and agreed with the plaintiff to manufacture and deliver to the plaintiff [*describe the goods to be manufactured*] at the price of dollars, for which the plaintiff agreed to pay the defendant dollars.

II. That the plaintiff duly performed all the conditions of said agreement on his part.

III. That defendant did manufacture, under said agreement [*name goods manufactured*] but manufactured them in an unskillful and unworkmanlike manner, in this [*here describe defects*] whereby the plaintiff suffered damage in the sum of dollars.

WHEREFORE, etc.

818. For goods made on defendant's order, not accepted.

I. That on the day of, 19.., at the defendant employed the plaintiff to make for him [*designate ar-*

ticles] and agreed to pay for the same, upon delivery thereof, ... dollars [of which contract a copy is annexed as a part of this complaint]

II. That the plaintiff made the said [articles] and on the day of, 19.., tendered the same to the defendant, and has ever since been ready and willing to deliver them, and has otherwise duly performed all the conditions on his part.

III. That the defendant has not accepted or paid for the same.

WHEREFORE, etc.

819. Against a builder for not completing building.

I. That on the day of, 19.., at, plaintiff and defendant entered into an agreement, under their hands and seals [*or*, the hand and seal of the defendant] of which a copy is annexed and made part of this complaint, marked Exhibit A [*or state its legal effect, e. g., thus:* whereby defendant agreed to erect, in a substantial manner, a two story frame house in the village of county of and to have the said house completed and ready for occupancy on or before the day of, 19.., for which this plaintiff agreed to pay him dollars payable as follows: When the foundation should be laid, the sum of dollars; when the first story should be up and the second tier of beams laid, ... dollars; when the second story should be up and the third tier of beams laid dollars; and when the roof should be on, ... dollars; and when the house should be entirely completed the balance of dollars.

II. That plaintiff duly performed all the conditions thereof on his part.

III. That the defendant entered upon the performance of the work under said contract, and laid the foundations of the said house, and commenced the erection of the first story thereof, but has neglected to finish the said building pursuant to said contract and has left the same with the foundations laid and the walls of the first story partly up, and that although the time for the completion of said building expired before this action he refuses to complete the same.

IV. That the plaintiff, on the day of, 19.., at, made an agreement with one E.... F.... whereby he agreed to let, and said E.... F.... agreed to hire the said building for one year from the day of, 19.., at the yearly rent of dollars, of which the defendant had due notice.

V. That by reason of the defendant's failure to complete

the contract aforesaid upon his part, the plaintiff has been unable to complete said house so as to give said M.... N.... occupancy thereof, and has been deprived of the profits of said lease and has been otherwise greatly injured, to his damage dollars.

WHEREFORE, etc.

820. Against a builder for not well finishing a building.

I. That on the day of, 19.., at, this plaintiff and the defendant entered into an agreement in writing under their hands and seals, of which a copy is annexed and made part of this complaint.

II. That the plaintiff duly fulfilled all the conditions thereof on his part.

III. That the defendant did not fulfill said contract on his part, but on the contrary erected said building in so unskillful and negligent a manner [and of so unsuitable materials] that shortly after its completion the foundation settled, the walls cracked, the roof and walls became leaky, a considerable portion of the plastering fell, and the house otherwise was and is entirely untenable and nearly useless through the negligent and unskillful manner of its erection, to the damage of the plaintiff dollars.

WHEREFORE, etc.

821. Against an attorney for negligent prosecution of an action.

I. That the defendant, being an attorney of the court of this state, the plaintiff in or about the month of, 19.., retained and employed him as such, for a compensation to be paid him therefor, to prosecute and conduct an action in the court on behalf of this plaintiff against one E.... F.... for the recovery of a large sum of money due from him to this plaintiff, and the defendant undertook to prosecute said action in a proper, skillful and diligent manner as the attorney of the plaintiff.

II. That the defendant might, in case he had prosecuted said action with due diligence and skill, have obtained final judgment therein for this plaintiff before the day of, 19.., yet he did not do so, but so negligently and unskillfully conducted said action that by his negligence, delay and want of skill he did not obtain judgment until the day of, 19.., and that meanwhile said E.... F.... had become insolvent, whereby the plaintiff was hindered and deprived of the

means of recovering said sum of money, to his damage dollars.

WHEREFORE, etc.

822. Same, for negligent defense.

I. That the defendant, being an attorney of the court of this state, the plaintiff, in the month of, 19.., at, employed him as such, for a compensation to be paid him therefor, to defend on behalf of this plaintiff an action brought against him by E.... F.... then pending in the court for the recovery of a large sum of money due from him to this plaintiff, and the defendant undertook to defend said action in a proper, skillful and diligent manner as the attorney of the plaintiff.

II. That such proceedings were had in such action that it became the duty of the defendant as the attorney of this plaintiff to interpose an answer on his behalf to the complaint therein, on or about the day of, 19.., but he wholly neglected so to do, and by reason thereof and through his negligence, judgment by default was obtained against the plaintiff in said action, and by reason thereof this plaintiff was compelled to pay to the said E.... F...., ... dollars, the sum so recovered by him, and was put to costs and charges in his endeavor to defend such action, amounting to the sum of dollars, and lost the means of recovering the same back from said E.... F....

WHEREFORE, etc.

823. The same, for negligence in examining a title.

I. That at a time hereafter mentioned the plaintiff made a contract with one E.... F.... for the purchase from him of certain real property [*very briefly designate the premises*] for the sum of dollars, which property said M.... N.... assumed to have power to convey in fee, and clear of all incumbrances.

II. That the defendant being an attorney, the plaintiff, at in the month of, 19.., employed him as such to examine the title of E.... F.... to said property, and to ascertain if the title were good, and if any incumbrances existed thereon, and to cause and procure an estate therein in fee simple and clear of all incumbrance, to be conveyed to the plaintiff, which the defendant, for compensation to be paid to him, undertook to do.

III. That the defendant did not do so, but negligently and unskillfully conducted in respect to such examination and did

not use endeavors to cause or procure a good and sufficient title in fee, clear of incumbrance to be conveyed to the plaintiff, but wrongfully advised and induced the plaintiff to pay said E.... F.... the sum of dollars, being said purchase money of the premises, when in fact said M.... N.... had no title thereto [or when said property was subject to incumbrances to the sum of dollars, as follows [*specifying them*], and the plaintiff in order to release the premises from said incumbrances was compelled to pay the holders thereof the sum of dollars]; to the damage of the plaintiff dollars.

WHEREFORE, etc.

824. Against a physician for malpractice.

I. That the defendant being a physician, the plaintiff, at, in the month of, 19.., employed him as such to attend the plaintiff to cure him of a malady from which he then suffered, for compensation to be paid therefor, and for that purpose he undertook as a physician to attend and care for the plaintiff.

II. That defendant then entered upon such employment but did not use due and proper care or skill in endeavoring to cure the plaintiff of the said malady, in this: that the defendant did not bleed the plaintiff at an early stage of the sickness, when if the defendant had used due or proper care or skill in that behalf he would have bled him; and also in this, that the defendant at a subsequent stage of the plaintiff's malady bled the plaintiff in a profuse and immoderate extent, taking from him ounces of blood, the same being an excessive and injurious quantity, and which the defendant if he had used proper care and skill, ought not to have taken; and also in this, that the defendant, on, etc., and on the fourteen days next following, unskillfully and negligently administered to the plaintiff grains of mercury every six hours during that time, the same being excessive and injurious doses, and which the defendant if he had used due and proper care and skill ought not to have administered to the plaintiff.

III. By reason of the several premises the plaintiff was injured in his health and constitution, suffered great pain, was weakened in body, and was obliged to and did expend the sum of dollars in endeavoring to be cured of the said sickness, which was prolonged and increased by the said unskillful and improper conduct of the defendant, to the damage of the plaintiff dollars.

WHEREFORE, etc.

825. Against a surgeon for malpractice.

I. That on the day of, 19.., at, the plaintiff was kicked on the right leg by a vicious horse, and the same was thereby broken and greatly injured. That at that time, the defendant being a surgeon, the plaintiff called and informed him of the manner of receiving such injury, and employed him as such surgeon to examine such broken leg and ascertain the extent of the injury thereby caused and to set the same, if broken, and to treat and heal the same for whatever the injury was to it; and for that purpose the said defendant undertook to treat and heal said injured leg for whatever the injury was or may have been to it.

II. That pursuant to said undertaking said defendant examined the said injured leg of the plaintiff in a negligent and unskillful manner, and failed to ascertain that the same was broken or the extent of the injury to the same, and that he treated and tried to heal the same as though it was not broken, greatly to the plaintiff's injury.

III. That by reason of the defendant's negligence and unskillful examination and treatment of plaintiff's said broken leg the plaintiff was made sick and kept from attending to his business ever since the date aforesaid, suffered much pain and annoyance and was put to great expense, and has been and still is disabled from attending to his labor and business, to the damage of the plaintiff dollars.

WHEREFORE, etc.

CHAPTER XLI.

COMPLAINTS FOR BREACH OF CONTRACTS OF INDEMNITY.

- | | |
|---|---|
| 826. Surety against principal on promise to indemnify. | 829. The same, against sureties on copartner's bond of indemnity. |
| 827. Sub-tenant against immediate lessor. | 830. Upon promise to indemnify plaintiff for defending an action for money claimed by defendant and a third person. |
| 828. Retiring partner against copartners on promise to pay debts of firm. | |

In an action upon a contract of indemnity against damage, the allegations of the complaint must show actual damage and that plaintiff was compelled to pay, by action or otherwise, the amount which he claims to recover. If compelled to pay by action the court in which the action is brought should be named and the action particularly described, giving the date of the judgment. If, however, the agreement of indemnity was simply to indemnify from liability it is only necessary to allege facts showing that the liability has been incurred and become absolute. *Selleck v. Griswold*, 57 Wis. 291.

826. Surety against principal on promise to indemnify.

I. That on the day of, 19.., at, the defendant, in consideration that the plaintiff would become surety for him by executing a bond [*or name other obligation*] of which a copy is annexed as a part of this complaint, marked Exhibit A, the defendant promised and agreed with the plaintiff that he would indemnify him and save him harmless from and against all damages, costs, and charges which he might sustain by reason of his becoming surety as aforesaid.

II. That the plaintiff, relying upon such promise of the defendant, duly executed and delivered such bond [*or other obligation*].

III. That the defendant did not indemnify the plaintiff and save him harmless from such damages, costs and charges; but, on the contrary, the plaintiff by a judgment on or about the day of, 19.., duly given against him by the court at in an action brought against him upon said

bond, was compelled to pay, and on or about the day of, 19.., did pay dollars to E.... F.... in satisfaction and discharge of said bond, and he incurred also necessary costs and expenses in said action and on account of said bond, to the amount of dollars.

IV. That defendant had notice of the premises, but has not paid any part thereof to the plaintiff.

WHEREFORE, etc.

827. Sub-tenant against immediate lessor.

I. That at the times hereinafter mentioned the defendant held certain premises [*very briefly designating them*] as tenant thereof to one M.... N.... at a yearly rent of dollars, payable by the defendant to said M.... N.... on the [*state days of payment*].

II. That on the day of, 19.., in consideration that the plaintiff then became the tenant to the defendant of said premises [*or, of, which premises were a portion of the above described premises*] at a yearly rent of dollars, payable to him by the plaintiff, the defendant gave to the plaintiff a written agreement to indemnify him, of which a copy is attached hereto, marked Exhibit A [*or state its substance, e. g., thus:* and thereby promised that he would, during the continuance of the tenancy of the plaintiff, indemnify him and save him harmless from and against the payment of the rent payable to M.... N.... as aforesaid, and from and against all costs, damages or expenses to which he might be put by reason of any default in the payment thereof].

III. That the defendant, contrary to his promise, omitted to pay the rent which became due to said M.... N.... on the day of, 19.., which was during the tenancy of the plaintiff under said agreement.

IV. That by reason thereof said M.... N.... on the day of, 19.., in the court of county, commenced proceedings to recover the possession of said premises, which were then occupied by the plaintiff under said agreement, for the non-payment of said rent; and thereby the plaintiff was obliged to pay, and on the day of, 19.., did pay to said M.... N.... to the use of the defendant the sum of dollars, the amount of said rent, together with dollars, the costs and charges of said proceedings, and was put to great trouble and inconvenience, to the damage of the plaintiff dollars.

WHEREFORE, etc.

828. Retiring partner against copartners on promise to pay debts of firm.

I. That the plaintiff and the defendants, having been partners in trade at, under the firm name of B. . . . & Z. . . . , on the day of, 19. . . , dissolved the partnership and mutually agreed that the defendants should take and keep all the partnership property, pay all debts of the firm, and indemnify the plaintiff against all claims that might be made upon him on account of any indebtedness of the said firm and all costs and charges thence arising.

II. That the plaintiff duly performed all the conditions thereof on his part.

III. That the defendants have not paid all said debts nor indemnified the plaintiff therefrom, but on the contrary, on the day of, 19. . . , one M. . . . N. . . . recovered judgment, which was duly given in the court against the plaintiff and defendants, upon a debt due from the said firm to the said M. . . . N. . . . , of which debt the defendants had notice but failed to pay, and on the day of, 19. . . , the plaintiff paid dollars in satisfaction of the same.

IV. And for a further breach the plaintiff alleges, etc. [*setting forth any other liabilities*].

V. That the defendants have not paid the same to the plaintiff.

WHEREFORE, etc.

829. The same, against sureties on copartners' bond of indemnity.

I. That on the day of, 19. . . , the plaintiff and one C. . . . D. . . . , theretofore copartners in business as plumbers, in the city of under the firm name of A. B. . . . & Co. dissolved their connection as such copartners and thereupon entered into an agreement in writing, of said date, duly executed and signed by them respectively, and delivered, whereby it was among other things mutually agreed that the said C. . . . D. . . . should retain and keep to his sole and separate use all and singular the partnership property of every name and character, whether in action or possession, and wheresoever situated; and in consideration thereof, whereas the said copartnership was indebted to sundry persons in sundry considerable sums of money, he should pay and discharge the debts so due by the said firm to the extent of dollars from his own individual resources, and to the like extent hold the plaintiff harmless and indemnified of and from and by reason of any claims or liabilities due by the said firm [*or, instead*

of stating the substance, say: which agreement contained covenants on the part of the said C.... D...., of which the following is a copy: copy of covenant].

II. That the defendants, in consideration of said agreement between said C.... D.... and the plaintiff, and of one dollar to each of them then paid by the plaintiff, entered into an undertaking in writing, duly executed and signed by them respectively, and delivered to the plaintiff [a copy whereof is annexed as a part of this complaint, marked Exhibit A] whereby they severally undertook and bound themselves to the plaintiff for the faithful performance by the said C.... D.... of the covenants in said agreement to be kept and performed on said C.... D....'s part.

III. That said C.... D...., under his said agreement with the plaintiff, retained and kept to his sole and separate use all the partnership property of the firm, but has not pursuant thereto paid and discharged the debts due by said firm to the extent aforesaid and has failed to hold this plaintiff harmless and indemnified to the like extent, of and from and by reason of any claim or liabilities due by the said firm.

IV. That at the time of the dissolution of the partnership and agreement aforesaid, the said firm were indebted to the firm of L.... & Co., of for merchandise sold and delivered, in the sum of dollars, which was then due and payable, which indebtedness formed a part of the dollars, debts of A.... B.... & Co., and was included among such debts, to be paid by the said C.... D.... under his agreement aforesaid with the plaintiff; but the said C.... D...., although requested, would not pay L.... & Co. their said demand, or any part thereof.

V. That on the day of, 19.., last, an action was duly commenced by the plaintiff, in the court of county, to recover upon and by virtue of the aforesaid agreement, from the said C.... D.... the said amount with interest, then due by the said A.... B.... & Co. to the said firm of L.... & Co., amounting to dollars, and interest thereon; and such proceedings were thereupon had that on the day of, 19.., judgment was recovered in such action [which was duly given] in favor of the plaintiff against the said C.... D.... for the sum of dollars, including costs, upon which judgment execution was at once duly issued against the said C.... D.... and is returned wholly unsatisfied.

VI. That prior to the commencement of said action the plaintiff caused notice in writing to be served on the defendants respectively, as sureties aforesaid, of his intention to commence

such action to compel the payment of the indebtedness aforesaid to said L.... & Co., by said C.... D.... or for him, but the defendants altogether neglected to pay attention to said notice.

VII. That plaintiff has necessarily paid or expended, in consequence of the neglect and refusal of said C.... D.... to comply with his agreement aforesaid with the plaintiff, at different times since the said day of, 19.., in addition to the costs of said action included in said judgment, for legal costs, counsel fees, disbursements and for other reasonable expenses, divers sums of money, amounting in the aggregate to dollars, which remain due and unpaid to the plaintiff by the said C.... D...., who, although [on the day of, 19..] requested, refuses to make payment thereof to the plaintiff.

VIII. That the defendants [although on the day of, 19.., requested] have not paid to the plaintiff the amount of said judgment, or the legal costs, counsel fees, disbursements and expenses aforesaid.

WHEREFORE, etc.

830. Upon promise to indemnify plaintiff for defending an action for money claimed by defendant and a third person.

I. That on or about the day of, 19.., one M.... N.... deposited with the plaintiff dollars.

II. That afterwards, on the day of, 19.., the plaintiff, at the request of the defendant, delivered to him the said sum of money so received from the said M.... N...., the defendant then claiming the same and the plaintiff not knowing to whom the same belonged.

III. That the said M.... N.... thereafter threatened to commence an action at law against the plaintiff for the recovery of said money.

IV. That afterwards, on the day of, 19.., the plaintiff, at the request of the defendant, agreed with the defendant that he would defend any action which the said M.... N.... should commence against him for the said money, and the defendant, in consideration of the premises then promised the plaintiff to save him harmless from the consequences of the said action.

V. That the said M.... N.... afterwards, on, etc., prosecuted an action against the plaintiff in the court of county, for the recovery of the said sum of money, of which the defendant then had notice.

VI. That plaintiff, with the privity of the defendant, and to the best of his ability, defended the said action, but the said M.... N.... in term, 19.., of said court, recovered a judgment against the plaintiff in said action to the amount of dollars, and afterwards an execution issued upon the said judgment, and the plaintiff, to prevent his property from being taken on said execution, was forced to pay and on the day of, 19.., did pay the said sum of dollars, and also the sum of dollars for poundage and officers' fees and other expenses upon the said writ. And plaintiff was also, by means of the premises, put to other charges and expenses of his moneys, amounting to the sum of dollars, in defending and settling the said action.

WHEREFORE, etc.

CHAPTER XLII.

COMPLAINTS ON PROMISE OF MARRIAGE.

831. For refusal.

832. The same, with allegations of special damage.

833. The same, alleging marriage with another

831. For refusal.

I. That on the day of, 19.., at, in consideration that the plaintiff, who was then unmarried, would marry the defendant on request, the defendant promised to marry the plaintiff within a reasonable time [*or, on the day of, 19..; or, on request; or otherwise, according to the tenor of the promise*].

II. That plaintiff, relying upon said promise, has always since remained and now is ready and willing to marry the defendant.

III. That defendant has failed and refused to marry the plaintiff, although a reasonable time elapsed before this action [*or, although she, on the day of, 19.., requested him so to do*], to her damage dollars.

WHEREFORE, etc.

832. The same, with allegations of special damage.

[*Allegations I, II and III as in the last preceding form.*]

IV. That by reason of his said promise of marriage so made as aforesaid, the defendant was enabled to and did debauch the plaintiff, whereby the health of the plaintiff was seriously injured and she suffered damage in the sum of dollars.

WHEREFORE, etc.

833. The same, alleging marriage with another.

[*I and II as in preceding form.*]

III. That the defendant afterwards married a certain other person, to-wit, one M.... N.... contrary to his said promise to the plaintiff. [*Or: III. That at the time of making said promise the defendant represented to the plaintiff that he was unmarried, whereas, in fact, he was then married to another person, of which fact the plaintiff had no notice.*]

WHEREFORE, etc.

CHAPTER XLIII.

COMPLAINTS FOR BREACH OF CONTRACT OF SALE OF PERSONAL PROPERTY.

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| 834. Against seller for not delivering. | 840. Seller against buyer for refusal to receive goods sold. |
| 835. The same, on oral contract alleging part payment. | 841. The same, on a contract made by a broker. |
| 836. The same, alleging delivery of part of goods. | 842. Seller against buyer for refusal to execute note. |
| 837. Allegations of special or consequential damages. | 843. Seller against buyer, after resale by auction. |
| 838. Allegation of refusal to perform by defendant, excusing plaintiff's failure to offer to receive and pay. | 844. For breach of contract to deliver goods, or to pay for them in a reasonable time. |
| 839. Against seller of stock for failure to deliver. | 845. For breach of contract not to carry on rival business. |

834. Against seller for not delivering.

I. That on the day of, 19.., at the plaintiff and the defendant entered into an agreement [in writing, which was subscribed by the defendant, *or*, by the agent of the defendant duly authorized thereto, and thereby it was mutually agreed between them, as follows]: that the defendant should sell and deliver to the plaintiff at, and on or before the day of, 19.. [or, on demand, *or*, within a reasonable time, *or otherwise as the case was*] fifty barrels of flour and that the plaintiff should pay the defendant therefor, upon the delivery of said flour, at the rate of dollars for each barrel.

II. [*Where neither time nor place of delivery were fixed*]: That on the day of, 19.., which was a reasonable time after the making of said contract, at, the plaintiff was ready and willing, and duly offered to receive and pay for said flour and otherwise has duly performed all the conditions thereof on his part.

Or: II. [*Where both time and place were fixed*]: That the plaintiff was ready at the time and place appointed to receive said flour, and to pay for the same according to the agreement, and otherwise has duly performed all the conditions thereof on his part.

Or: II. [Where the particular time of delivery was not appointed]: That on the day of, 19.., which was a reasonable time after the making of said contract, and at the place appointed, the plaintiff was ready to receive said flour, and pay for the same according to the agreement, of which the defendant had due notice; and the plaintiff has otherwise performed all the conditions thereof on his part.

Or: II. [Where tender and demand are necessary to be proved under the agreement]: That on the day of, 19.., at, the plaintiff was ready, and duly offered to the defendant, to receive and pay for said flour pursuant to the agreement, and requested the defendant to deliver the same; and otherwise has duly performed all the conditions thereof on his part.

III. That the defendant has failed and refused to deliver the said flour or any part thereof, [*or, if part has been delivered, add: except barrels of said flour, which was delivered by defendant and paid for by plaintiff on the day of, 19..*], whereby the plaintiff has suffered damage to the amount of dollars.¹

WHEREFORE, etc.

835. The same, on oral contract alleging part payment.²

I. That on the day of, 19.., at, it was mutually agreed between the plaintiff and the defendant that the defendant should sell and deliver to the plaintiff at and on or before the day of, 19.. [*designate the thing*] and that the plaintiff should pay to the defendant therefor at the rate of dollars per amounting to dollars, payable as follows: dollars at the time of making said agreement, and the residue on the delivery of the said property.

II. That the plaintiff thereupon paid to the defendant the sum of dollars in pursuance of the agreement.

[*Add allegations of default by defendant and willingness to receive by the plaintiff, as in first form in this chapter.*]

WHEREFORE, etc.

¹ Under this general statement of damage only ordinary damage can be recovered, namely the difference between the contract price of the goods and the market price

of the same quality of goods at the time of the delivery.

² To take the case out of the statute of frauds the part payment must be made at the time of the making of the contract.

836. The same, alleging delivery of part of goods.³

[*Proceed as in last above form, inserting in place of allegation II the following*]:

II. That at the time of the making of said contract [or, thereafter and on the day of, 19.., at] the defendant delivered and the plaintiff accepted a part of said property, to-wit [*describe goods delivered*] in pursuance of and as part performance of said contract.

[*Add other allegations as in preceding forms.*]

837. Allegations of special or consequential damages.

[*If goods are not obtainable in the market and have been purchased for the purpose of filling a contract to resale already made, or if there be other circumstances causing special damages, and such circumstances were known to the defendant, such special damages may be recovered, but the facts must be alleged in the complaint. Guetzkow v. Andrews, 92 Wis. 214, as for instance*]:

That prior to the making of said agreement the plaintiff had entered into a contract with one M.... N.... to sell and deliver to him said [*describe the property*] for the sum of dollars, which said M.... N.... had agreed to pay therefor; that the said defendant was duly notified of said last named contract of resale at the time of the making of said agreement of sale between plaintiff and defendant, and knew that the plaintiff purchased said property in order to fulfill his said contract with said M.... N.... That said property was not obtainable in the open market at [*place of delivery*] at the time the same was to be delivered to plaintiff and not prior to the day of, 19.., and that by reason of the defendant's said failure to deliver the same to plaintiff as agreed the plaintiff suffered the loss of his profits upon such resale, to-wit, the sum of dollars.

838. Allegation of refusal to perform by defendant, excusing plaintiff's failure to offer to receive and pay.

[*If defendant notified plaintiff prior to time for delivery that he would not perform, the fact may be thus alleged*]:

That prior to the time for the performance of said contract by defendant, the said defendant notified the plaintiff that he

³ Delivery and acceptance of a part of the property in pursuance of the contract takes the case out of the statute of frauds whether

the delivery and acceptance be at the time of making the contract or afterward. *Arnson v. Doeher*, 35 Wis. 615.

would not deliver the said [*describe property*] or any part thereof, and that the plaintiff in reliance upon said notice did not offer to receive or pay for said property and alleges that he was excused from making any such offer by reason of said notice.

839. Against seller of stock for failure to deliver.

I. That on the day of, 19.., at, this plaintiff and defendant entered into an agreement [in writing, subscribed by the defendant, *or* by the agent of the defendant, duly authorized thereto, whereby it was mutually agreed between them] that the defendant should sell and deliver to the plaintiff at such time, within days thereafter, as the plaintiff should elect [*or*, that the defendant then sold and would at such time, within days thereafter, as the plaintiff should elect, deliver to him] shares of the capital stock of the X.... Y.... Company, and that the plaintiff should pay him therefor dollars.

II. That the plaintiff duly performed all the conditions thereof on his part. [*Or*: II. That on the day of, 19.., at, this plaintiff duly tendered to the defendant said sum of dollars, and demanded of the defendant that he deliver said shares of stock to the plaintiff.]

III. That the defendant refused to deliver the same; to the damage of the plaintiff dollars.

WHEREFORE, etc.

840. Seller against buyer for refusal to receive goods sold.

I. That on the day of, 19.., at the plaintiff and defendant entered into an agreement in writing [subscribed by the defendant, *or*, by the agent of the defendant, duly authorized thereto] of which the following is a copy: [*copy of the contract, or allege its effect, as in preceding forms*].

II. That the plaintiff duly performed all the conditions of said contract on his part, and was, on the day of, 19.. [*the day on which delivery was to be made*] ready and willing to deliver the [*goods*] therein mentioned, and on said day, at, duly tendered the same to the defendant.

III. That the defendant refused to accept said goods, and to pay for them pursuant to his agreement, to the damage of the plaintiff dollars.

WHEREFORE, etc.

841. The same, on a contract made by a broker.

I. That on the day of, 19.., the plaintiffs and the defendants entered into an agreement in writing, by the

hand of M.... N.... a broker duly authorized to make the same, both on behalf of the plaintiffs and of the defendants, of which the following is a copy: [*copy of bought and sold note*].

II. That at the time of making said contract, the defendants paid to the plaintiffs the sum of dollars mentioned therein.

III. That the plaintiffs were, at all times within said days, ready and willing to deliver the [*goods*] therein mentioned to the defendants, and receive the balance of the price therefor, and in all respects to comply with the terms of said contract on their part, and that within the days mentioned in said contract, to-wit, on the day of, 19.., at, they duly tendered the said [*goods*] to the defendants, and demanded payment of the balance of the price thereof.

IV. That the defendants refused to receive said [*goods*] or pay the balance of the price therefor, to the damage of the plaintiffs dollars.

WHEREFORE, etc.

842. Seller against buyer for refusal to execute note.

I. That on the day of, 19.., at, this plaintiff sold and delivered to the defendant, merchandise [*describing same*] of the value of dollars.

II. That the defendant then and there promised to give the plaintiff therefor his negotiable promissory note on that day [*or, on the day of, 19.., or, on demand, or, within a reasonable time thereafter*] dated that day [*or, dated on the day of, 19..*] for the said sum of dollars, payable in months from said date.

III. That on the day of, 19.., at, the plaintiff duly demanded such note from the defendant, but the defendant refused [*or, that although a reasonable time for the delivery of such note had elapsed before the commencement of this action, yet the defendant has neglected*] to deliver such note to the damage of the plaintiff dollars.

WHEREFORE, etc.

843. Seller against buyer, after resale by auction.

I. That on the day of, 19.., at, the plaintiff sold to the defendant, by auction [*briefly designate the goods*] for the sum of dollars, subject to the condition that all goods not paid for and removed by the buyer within days after the sale, should be resold, by auction, on his account, of which condition the defendant had notice.

II. That the plaintiff was ready and willing to deliver the

same to the defendant, on the said day, and for days thereafter, of which the defendant had notice, and the plaintiff has otherwise duly performed all the conditions of said sale, on his part.

III. That more than days after the sale, and on or about the day of, 19.., at, the defendant not having taken away said goods, nor paid therefor, the plaintiff resold the same by public auction for account of the defendant for dollars, pursuant to said condition, the expenses of which resale amounted to dollars.

IV. That no part of the deficiency of dollars, thus arising, has been paid.

V. That by reason of the premises the plaintiff has suffered damage in the sum of dollars.

WHEREFORE, etc.

844. For breach of contract to redeliver goods, or to pay for them in a reasonable time.

I. That on the day of, 19.., at, the plaintiff, at the request of the defendant, delivered to him [*briefly describe the goods*] of the plaintiff, of the value of dollars upon the condition and consideration that the defendant would purchase the same for dollars [*or, at a reasonable price*] or return the same to the plaintiff within a reasonable time, which the defendant then and there undertook to do.

II. That the plaintiff duly performed all the conditions of said agreement on his part.

III. That although a reasonable time for the defendant to purchase and pay for said goods, or to return the same to the plaintiff had elapsed before the commencement of this action, he has not done so, to the damage of the plaintiff dollars.

WHEREFORE, etc.

845. For breach of contract not to carry on rival business.

I. That the defendant carried on the business of, at, and on or about the day of, 19.., in consideration that the plaintiff would purchase from him his store and goods for the sum of dollars, and the good-will of the said business for the sum of dollars, the defendant agreed with the plaintiff that he would not at any time thereafter, by himself, or partner, or agent, or otherwise, either directly or indirectly set up or carry on the business of a

....., at, or at any other place within the town of

II. That the plaintiff accordingly purchased from the defendant his said for the price and at the terms aforesaid, and paid said sum of dollars for the good-will of said business.

III. That the plaintiff duly performed all the conditions of said agreement on his part.

IV. That the defendant, in violation of his agreement, afterwards set up and carried on the said business of at and is now continuing to carry on the said business, all to the damage of the plaintiff in the sum of dollars.

WHEREFORE, etc.

CHAPTER XLIV.

COMPLAINTS FOR BREACH OF WARRANTY OF CHATTELS SOLD.

- | | |
|--|---|
| 846. On a warranty of the soundness of a horse. | 849. On a warranty of title of chattels. |
| 847. On a warranty of the genuineness of a note. | 850. On a warranty of quality of a machine. |
| 848. On a warranty of the amount due on a judgment assigned. | 851. On a warranty resulting from a sale by sample. |
| | 852. On implied warranty of fitness for a particular use. |

846. On a warranty of the soundness of a horse.

I. That on the day of, 19.., at, the defendant offered to sell to the plaintiff a certain horse, and warranted and represented said horse to be sound, kind, and true, and gentle and quiet in harness [*or otherwise state the warranty given, in accordance with the fact*].

II. That the plaintiff, relying upon said warranty and representations, then and there purchased said horse, and paid to the defendant therefor the sum of dollars.

III. That at the time of said warranty and sale the said horse was unsound, unkind, and untrue, and restive and ungovernable in harness, and had an infectious disease, and was utterly worthless [*or otherwise state the breach, according to the warranty given*] [and was worth dollars less than the defendant represented and warranted] and was known by the defendant so to be; and that said horse still so remains.

IV. [*Allege special damage, if any, e. g., as follows*]: That thereafter said horse infected with said disease three other horses of the plaintiff, of the value of dollars, by reason whereof one of said horses died, and the others were rendered worthless; and the plaintiff was put to great expense in the care of said horses and in attempting their cure.

Or thus: IV. That the plaintiff, relying upon the said warranty of the said defendant, afterwards attempted to use the said horse in harness, and the said horse being unsteady, restive, and ungovernable in harness, without the fault of the plaintiff, ran away, greatly injuring and breaking the plaintiff's wagon,

and greatly injuring and bruising the plaintiff, whereby the plaintiff became sick, sore and lame, and was hindered from attending to his work as a mason, and was put to great expense in repairing his wagon and harness, and in recovering from his hurts.

V. That by reason of the premises this plaintiff was injured and misled, to his damage dollars.

WHEREFORE, etc.

847. On a warranty of the genuineness of a note.

I. That on the day of, 19.., at, the defendant offered to pass to the plaintiff for a valuable consideration, a promissory note [*describing it, e. g., thus: for the sum of dollars, made by one M.... N.... payable to his own order, and endorsed by him, which note bore date the day of, 19.., and was payable from date, or., a promissory note, of which the following is a copy: copy of note*] and then and there warranted the said note to have been in fact made by the said M.... N....

II. That the plaintiff, relying upon said warranty, purchased said note of the defendant, and paid him therefor the sum of dollars.

III. That in truth said note was not made by said M.... N.... but his name was forged thereto.

IV. That by reason of the premises the plaintiff was injured and misled, to his damage dollars.

V. [*Or allege facts showing special damage.*]

WHEREFORE, etc.

848. On a warranty of the amount due on a judgment assigned.

I. That on the day of, 19.., the defendant, for a valuable consideration, duly assigned to this plaintiff a judgment which he had, on the day of, 19.., recovered in the court, county of for the sum of dollars, in a certain action wherein A.... B.... defendant above named, was the plaintiff, and one M.... N.... was defendant.

II. That said assignment contained a covenant on the part of the defendant, of which the following is a copy [*copy of the covenant*] [*or, that the defendant did therein and thereby warrant that there was due upon said judgment from said M.... N...., the said sum of dollars, with interest thereon from the day of, 19..*]

III. That in truth, at the time of said assignment, said judgment had been paid in full [*or*, in part] to the defendant, and no part thereof [*or*, only the sum of dollars] was or now is due thereon.

IV. That by means of the premises this plaintiff was injured and misled, to his damage dollars.

WHEREFORE, etc.

849. On a warranty of title of chattels.¹

I. That on the day of, 19.., at the defendant offered to sell to the plaintiff for dollars, a certain pianoforte, and warranted said pianoforte to be the property of defendant.

II. That the plaintiff, relying on said warranty, purchased the same from defendant, and paid him therefor dollars.

III. That in truth said pianoforte was then not the property of defendant, but belonged to one M.... N....

IV. That thereafter the said M.... N.... sued the plaintiff to recover possession of the same; and that the plaintiff gave the defendant due and timely notice of the commencement of said action, and required him to defend the same, or judgment would be suffered by failure to answer; but the defendant neglected to defend said action, and such proceedings were afterwards had therein as that the said M.... N.... recovered, by legal process, possession of said pianoforte from the plaintiff, with dollars costs.

[*Where no action was brought, say*]: IV. That thereafter and on or about the day of, 19.., the said M.... N.... demanded of the plaintiff that he deliver possession of said pianoforte to him, the said M.... N.... and the plaintiff was compelled to and did deliver the same to the said M.... N.... whereby it was wholly lost to the plaintiff.

V. That by reason of the premises, the plaintiff has suffered damages in the sum of dollars.

WHEREFORE, etc

850. On a warranty of quality of a machine.

I. That at, on the day of, 19.., the defendant offered to sell to the plaintiff a self-binding reaper, which the defendant then and there warranted to be a first-class

¹ On a sale of chattels in the vendor's possession, at a fair price, there is always an implied warranty of title unless the facts and

circumstances of the sale are such as to warrant a different conclusion. *Edgerton v. Michels*, 66 Wis. 124.

machine of superior quality [*or otherwise state the warranty, according to the fact*].

II. That plaintiff, relying on said warranty, and believing the same to be true, was induced thereby to purchase and did purchase the said machine from the defendant, and paid him therefor the said sum of dollars.

III. That in truth and in fact said reaper was not a first-class machine of superior quality as by the defendant warranted, but the same was a second-class machine of a greatly inferior quality. [*Or otherwise state particularly the breach of warranty.*]

IV. That by reason of the premises, plaintiff sustained damages in the sum of dollars.

WHEREFORE, etc.

851. On a warranty resulting from a sale by sample.

I. That on or about the day of, 19.., at, the defendant offered to sell [*or, to manufacture and sell*] to the plaintiff certain [*described goods or property*] and then and there produced and exhibited to the plaintiff certain samples of such [*goods or property*] so to be purchased by the plaintiff, and as an inducement to the plaintiff to make such purchase, warranted and agreed that the [*describe goods or property*] should be in all respects equal to the said samples.

II. That the plaintiff, after examining said samples, purchased of the defendant [*describe goods purchased*] relying upon the defendant's said warranty and representation, and agreed to pay therefor the sum of dollars.

III. That thereafter and on or about, 19.., the defendant delivered to the plaintiff the said [*goods*] the same being packed in bales [*or boxes or otherwise, according to the fact*], and that upon the opening and examination of one of said bales [*or boxes*] the goods therein were found to correspond with the said samples, whereupon the plaintiff, relying upon the aforesaid warranty, and upon the partial examination so made, accepted the whole of said goods and paid the defendant the agreed price therefor, to-wit, the sum of dollars.

IV. That thereafter and without knowledge of their real condition, plaintiff sold and delivered a portion of said goods to their customers; that said customers afterwards returned the same as damaged [*or imperfect*] and refused to keep or pay for them; that thereupon the plaintiff examined the remainder of the goods so delivered by defendant, and found that no part thereof corresponded with said samples, but they were imper-

fect and unmerchantable, and inferior in all respects to said samples, and of no value.

V. That plaintiff immediately notified defendant of the character and condition of said goods, as aforesaid, and offered to return the same, but defendant refused to receive them or to return to plaintiff the price paid therefor.

VI. That by reason of the aforesaid, plaintiff has been damaged dollars.

WHEREFORE, etc.

852. On implied warranty of fitness for a particular use.

I. That at all the times hereinafter mentioned the plaintiff was a manufacturer of [*state what*] having a manufactory at

II. That the defendant, knowing of the manufacturing business in which the plaintiff is and was engaged, and knowing that the plaintiff desired to purchase [*state what*] to be used in said business sold and delivered to the plaintiff on or about the day of, 19.. [*state what*] to be used by the plaintiff in the said manufacturing business, to the knowledge of the defendant, and the defendant then and there warranted the same to be in all respects fit and proper for such use, and the plaintiff paid the defendant therefor the sum of dollars.

III. That plaintiff relied upon said warranty, and attempted to use said goods for the purpose aforesaid, but that the same when manufactured proved unsound [*or state particularly the unfitness, according to fact*], and unsuited for manufacture, in the plaintiff's said business.

IV. That as soon as said unfitness was ascertained, plaintiff notified defendant thereof, and offered to return the balance of said goods which had not theretofore been manufactured.

V. That defendant refused to accept said goods, or any part thereof, or to repay to plaintiff the purchase price thereof, to his damage dollars.

WHEREFORE, etc.

CHAPTER XLV.

COMPLAINTS IN ACTIONS FOR DECEIT.

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| 853. General form. | taken in payment for services. |
| 854. For fraudulently obtaining goods on credit. | 864. Complaint for concealment of disease in a horse, where fraudulent means were used to deceive the purchaser. |
| 855. For fraudulently obtaining credit for another. | 865. Allegation that fraud was accomplished through an agent. |
| 856. For fraudulently misrepresenting the area of a tract of land. | 866. For false representations as to solvency made through a commercial agency. |
| 857. For fraudulent representations of title of chattels. | 866a. Complaint by insured against officers of insolvent insurance company, for false representations inducing plaintiffs to insure. |
| 858. For fraud in the quantity of chattels delivered. | 866b. Complaint by bank depositor against directors for fraudulent published statements inducing deposit. |
| 859. For fraudulent sale of goodwill of a business. | 866c. Complaint against officers of a corporation for issuing a false prospectus inducing purchase of stock. |
| 860. For fraudulent representations as to quality of goods. | |
| 861. For deceit in the exchange of property. | |
| 862. By tenant against landlord for falsely representing a wall in an apartment house to be fireproof (Wisconsin). | |
| 863. For fraudulently misrepresenting value of stock in a corporation, agreed to be | |

The action to recover damages resulting from false representations or deceit is a simple action of tort. The general doctrine is that the cause of action is complete if it be shown that the representations were intended to be acted upon and were material and false representations as to matters of fact, which the maker knew or ought to have known were false, or that they were made recklessly with no knowledge on the subject, and that the injured party was entitled to and did rely upon them as true without the present means of knowledge of their falsity, and suffered legal damage by reason thereof. *Kountz v. Kennedy*, 147 N. Y. 124; *Krause v. Busacker*, 105 Wis. 350; *Bullitt v. Farrar*, 42 Minn. 8 s.c. 43 N. W. 566. In Iowa it is held that it must be shown that the defendant actually knew them to be

false. *Avery v. Chapman*, 62 Iowa, 144 s.c. 17 N. W. 454. The action may arise by reason of false representations in the sale of real estate as well as in the case of the sale of personal property. Nor is it confined to cases of the sale of property. It may be said that wherever negotiations are pending between parties in contemplation of a contract and false and material representations are willfully made as an inducement to enter into the contract and the other party is in ignorance of the truth and has no present means of ascertaining the falsity of the representations and relies upon them to his damage, a recovery may be had. This is equally true whether the representations be made by the defendant himself, or if they be made by an agent within the scope of his real or apparent authority.

853. General form.

I. That on the day of, 19.., the defendant falsely and fraudulently and with intent to defraud the plaintiff represented to the plaintiff that [*here state particularly the representations made*].

II. That the said representations were false in fact and known to be false by the said defendant at the time they were so made, and that in truth and in fact [*here state the truth as to the facts concerning which the representations were made*].

III. That the plaintiff relied upon said representations and was thereby induced to [*here state the act done in reliance upon the representations and the manner in which damage resulted*].

IV. That by reason of the premises the plaintiff has suffered damage in the sum of dollars.

WHEREFORE, etc.

854. For fraudulently obtaining goods on credit.

I. That on the day of, 19.., the defendant, with intent to deceive and defraud the plaintiff by inducing the plaintiff to sell goods to him, falsely and fraudulently represented to the plaintiff that he was solvent and worth dollars over all his liabilities [*or otherwise state the representation as made*].

II. That the plaintiff relied on said representations and was thereby induced to sell [and deliver] to the defendant [*describe the goods*] of the value of dollars.

III. That the said representations were false in that [*stating in what respect*] and were then known by the defendant to be so.

IV. That no part of the price thereof has been paid [*and, if the goods were not delivered*]; and that the plaintiff in preparing and shipping the said goods and in stopping them in

transit expended dollars] to his damage dollars.

WHEREFORE, etc.

855. For fraudulently obtaining credit for another.

I. That on the day of, 19.., the defendant, with intent to deceive and defraud the plaintiff, falsely and fraudulently represented to him that one M.... N.... was in good credit and safe to be trusted and worth the sum of dollars over and above his debts and liabilities [*or otherwise state the representations made*].

II. That the plaintiff relied on said representations and sold and delivered [*briefly designating the goods*] of the value of dollars, to said M.... N.... for a credit of months; but although said term has expired said M.... N.... has neglected and refused to pay for said goods.

III. That in truth, and as defendant then well knew, said M.... N.... was at the time of such representation insolvent, and not in good credit nor safe to be trusted, nor worth anything over and above his debts and liabilities [*or otherwise negative the truth of the representations*].

IV. That by means of said premises the plaintiff has wholly lost said goods, and the value thereof, to his damage dollars.

WHEREFORE, etc.

856. For fraudulently misrepresenting the area of a tract of land.

I. That the plaintiff on the day of, 19.., bargained with the defendant to buy of him a piece of land of the said defendant situate in [*very briefly designate it*] which said piece of land the defendant then, with intent to deceive and defraud the plaintiff, falsely and fraudulently represented to him to contain acres, when the defendant then well knew that it contained only acres.

II. That the plaintiff relied upon said representations, and was thereby induced to and did purchase said land, and did then pay therefor to the said defendant the sum of dollars.

III. That in truth the said piece of land did not contain acres, but only acres, and for that reason was worth only the sum of dollars, instead of the said sum of dollars, whereby the said plaintiff has sustained damages, to the amount of dollars.

WHEREFORE, etc.

857. For fraudulent representations of title of chattels.

I. That on the day of, 19.., the defendant having offered to sell to the plaintiff a certain horse, did, with intent to deceive and defraud the plaintiff, falsely and fraudulently represent to him that said horse was the property of defendant.

II. That the plaintiff relied on said representations and purchased said horse of the defendant and paid him therefor the sum of dollars.

III. That in truth and as defendant then well knew, said representations were false and said horse was not the property of the defendant, but was the property of one M.... N....

IV. That thereafter, the said M.... N.... sued this plaintiff in the court [*or*, before Q.... R.... a justice of the peace for the town of] to recover the value of said horse; that plaintiff immediately notified the defendant of the pendency of said action, and requested him to defend the same, but defendant refused to do so, and although this plaintiff used [employed one O.... P.... a competent attorney of the court of this state to defend and use] due diligence in the defense of said action, the said M.... N.... recovered a judgment against the plaintiff [duly given by said justice] for the sum of dollars, which this plaintiff has since paid [*or*, which judgment still remains outstanding and in full force].

V. That by reason of the premises, this plaintiff has been misled, to his damage dollars.

WHEREFORE, etc.

858. For fraud in the quantity of chattels delivered.

I. That the plaintiff, on the day of, 19.., bought of the defendant, and the defendant sold and agreed to deliver to the plaintiff [*briefly designate the merchandise and price, e. g., thus: ten tons of coal, for the price of dollars per ton*] and the plaintiff then and there relied upon the said promise of the defendant to deliver to plaintiff the full quantity of coal aforesaid and paid to the defendant the full sum of dollars therefor.

II. That the defendant afterwards and on the day of, 19.., intending to defraud the plaintiff, fraudulently and deceitfully delivered to him only [nine tons of coal] as and for the said quantity of [ten tons] so bargained for and sold; and pretending it so to be, though then well knowing that the [coal] so delivered did not contain the quantity bargained for and sold, but only [nine tons], to the damage of the plaintiff dollars.

WHEREFORE, etc.

859. For fraudulent sale of good-will of a business.

I. That on the day of, 19.., the defendant being engaged in business as and having to sell out the [stock, fixtures and] good-will of his said business to the plaintiff, did, with intent to deceive and defraud the plaintiff, falsely and fraudulently represent to him that the said business, as theretofore conducted by defendant, was a profitable business, and that the net profits thereof, realized by the defendant during the year ending the day of, 19.., had exceeded the sum of dollars [*or otherwise, as the representations were*].

II. That this plaintiff relied on said representations and so relying purchased of defendant the [stock, fixtures and] good-will of defendant, and paid him therefor the sum of dollars.

III. That in truth, and as defendant then well knew, said representations were false and said business was not and never had been a profitable business and the defendant had not realized any profits whatever from the same during the year ending the day of, 19.. [*or otherwise state specifically the particulars in which the representations were false*].

IV. That by reason of the premises this plaintiff was misled, to his damage dollars.

WHEREFORE, etc.

860. For fraudulent representations as to quality of goods.

I. That on the day of, 19.., the defendant offered to sell to plaintiff [*state property, as for instance: one hundred barrels of flour*] for the sum of dollars, and then and there falsely and fraudulently represented that said flour was of the best quality of winter wheat flour [*or otherwise state the representations according to the fact*].

II. That the plaintiff relied on said representations and was thereby induced to purchase said flour, and paid to the defendant therefor the said sum of dollars.

III. That in truth and in fact said flour was not of the best quality of winter wheat flour, which fact the defendant then well knew, but was [*here state quality*] and was not worth said sum of dollars, nor worth any sum in excess of dollars, and that said false representations were made by said defendant with intent then and there to cheat and defraud this plaintiff.

IV. That by reason of said false and fraudulent representations the plaintiff has suffered damage in the sum of dollars.

WHEREFORE, etc.

861. For deceit in the exchange of property.

I. That on the day of, 19.., the plaintiff being the owner of a certain horse of the value of dollars, and the defendant being the owner of a certain other horse, it was agreed between the parties to exchange said horses upon the following terms [*here state terms*].

II. That in order to induce the plaintiff to make said exchange the defendant falsely and fraudulently and with intent to deceive and defraud plaintiff represented to the plaintiff that the said horse of defendant was sound in every respect [*or otherwise state the misrepresentation*] whereas in truth and in fact said horse was not sound in this [*here state unsoundness*] and was only of the value of dollars, and the defendant well knew the actual condition of said horse at the time of the making of said misrepresentation.

III. That the plaintiff relied upon said representation and was induced thereby to exchange horses with the defendant upon the terms aforesaid and to pay the said defendant the sum of dollars in addition to the delivery of his said horse, whereby the plaintiff suffered damage in the sum of dollars.

WHEREFORE, etc.

862. By tenant against landlord for falsely representing a wall in an apartment house to be fireproof. (From *Matteson v. Rice*, 116 Wis. 328.)

I. That from some time prior to the year 19.. to about, 19.., defendant was the owner of a certain flat building, designed for residence and business purposes, in the city of state of located at street in said city.

II. That on or about the day of, 19.., said defendant, by and through his duly authorized agent E.... F.... leased to the plaintiff an apartment or flat in said building, known and described as Flat 27; and at all times hereinafter referred to or mentioned the said E.... F.... was duly authorized as the agent of said defendant to lease the flats of said building, including said Flat 27, on behalf of said defendant, to show the flats or apartments in said building, including the said Flat 27, to persons purposing to lease the same, and to explain to such persons the advantages, character, location and construction of said building and the apartments therein contained, with the view to inducing prospective tenants to become tenants in said building.

III. That in or about the year 19.., and prior to the leasing

of said Flat 27 by the plaintiff, said defendant informed said E.... F.... that the southeast wall of said flat building, the same being a partition or dividing wall between said flat building and a large store building, was a fire-proof wall, and that in case of fire originating in the said store building adjoining said flat building the flats in said flat building would be secure from fire by reason of the fact, as represented, that said wall was fire-proof; that said defendant so informed said E.... F.... and represented to him that the said wall was fire-proof, well knowing that he would, and intending that he should, communicate such information to persons purposing to lease flats or apartments in said flat building, and intending that he should use such information to induce such persons to lease such flats and become his [defendant's] tenants in said building.

IV. That at and before the time when he leased said Flat 27 as aforesaid, the plaintiff was shown the said flat by said E.... F...., acting for and on behalf of the said defendant, and for the purpose of inducing him [plaintiff] to lease said flat represented to him that the said southeast wall of said flat building was a fire-proof wall, and that in case of fire originating in the said store building the flats in said flat building, including said Flat 27, would be secure from fire by reason of the fact, as represented, that said wall was fire-proof; that the plaintiff, relying upon the representation of said E.... F.... that said wall was fire-proof, and believing the same to be true, was induced to lease said Flat 27, and did lease the same at the time aforesaid, by reason of said representation; that the plaintiff, immediately after leasing said flat, as aforesaid, entered into possession of said flat and continued to occupy the same for office and residence purposes under said lease and as the tenant of said defendant until on or about the day of, 19.., when the said flat building, including said Flat 27, was destroyed by fire, as hereinafter stated.

V. That on or about said day of, 19.., a fire originating in said store building adjoining said flat building, and separated therefrom by said alleged fire-proof wall, quickly extended into and was communicated to the said flat building, and the same, including said Flat 27, then occupied by plaintiff as the tenant of said defendant as aforesaid, was completely destroyed by said fire; that at the time when the said flat building was so destroyed by fire, this plaintiff had in said Flat 27, occupied by him as aforesaid, as appurtenant to the uses and purposes for which the said flat was rented, a large quantity of personal property belonging to him, an itemized statement of which, with the value thereof, is hereto annexed, marked Ex-

hibit A and made a part hereof, all of which, without the fault of this plaintiff, was wholly destroyed by said fire and totally lost to this plaintiff.

VI. That notwithstanding the statements and representations of the said defendant to the said E.... F.... as aforesaid to the effect that the wall dividing or separating said flat building from said store was a fire-proof wall, and that the flats in said flat building would be secure from fire originating in said store building, and notwithstanding the statements and representations of the said E.... F.... as aforesaid to the same effect, the said wall was not in fact a fire-proof wall and the said flats were not at the time of said statements and representations and never were protected from or secure from fire originating in said store building, or from the effects thereof, and there never was at any time a fire-proof wall dividing said store building and said flat building, or between the same; all of which, as this plaintiff is informed and believes, was, at the times when said statements and representations were made and at all other times well known to said defendant; that by reason of the situation of said flat building in relation to said store building, and by reason of the character of said last mentioned building and the purposes for which the same was designed to be used, the danger from fire to said flat building was greatly increased, rendering the said flat building, in the absence of a fire-proof wall, such as was represented to this plaintiff as existing as aforesaid, very liable to destruction by fire and by reason thereof dangerous and undesirable as a place of residence or for business purposes.

VII. That, as this plaintiff is informed and believes, the statements and representations made by said defendant to said E.... F.... to the effect that said wall was a fire-proof wall and that said flats would be protected thereby from fire originating in said store as aforesaid, were made by the said defendant fraudulently and with intent that the same should be communicated to persons desiring or purposing to lease said flats, and with intent to deceive such prospective tenants and persons leasing the said flats, among whom was this plaintiff.

VIII. Plaintiff further alleges, upon information and belief, that had there been a fire-proof wall dividing or separating said flat building from said store building, as represented by said defendant to said E.... F.... and by said E.... F.... on behalf of said defendant to this plaintiff, the said flats would have been protected from the fire which originated in said store building as aforesaid, and that the said property of this plaintiff would not have been by said fire destroyed.

IX. Plaintiff further alleges that by reason of the absence of such fire-proof wall and by reason of the false and fraudulent representations of the defendant the plaintiff suffered loss and sustained damage in the sum of dollars.

WHEREFORE, etc.

863. For fraudulently misrepresenting value of stock in a corporation, agreed to be taken in payment for services.
(See *Atwill v. LeRoy*, 4 Abb. Pr. 438.)

I. That on the day of, 19.., at, the defendant having offered to the plaintiff that he would assign and transfer to him shares of the par value of dollars each, of the capital stock of the M.... N.... company, a corporation, incorporated under the laws of and doing business in upon consideration that the plaintiff should render service [by himself and his servants] in [*state briefly the nature of the services agreed to be rendered*] did, with intent to deceive and defraud the plaintiff, falsely and fraudulently represent to him that said stock was of the market value of dollars and that defendant had paid all charges, calls and assessments laid or to be laid upon said shares by said company or the trustees or directors thereof [*or otherwise, as the false representations were*].

II. That the plaintiff, relying upon said representations, then and there agreed with the defendant to render [by himself and his servants] all necessary services that should be required by the defendant in said, etc., to the value, at the market prices for such services of dollars [*or otherwise state fully the nature and the value of the services agreed to be rendered*] and thereafter proceeded to and did render [and cause to be rendered] said services [*state facts showing how far the contract was performed by plaintiff*].

III. That in truth, and as defendant then well knew, the said stock was not then of the market value of dollars; but on the contrary, the said company was then insolvent and the stock worthless and unsalable in the market; and the defendant had not paid all charges, calls and assessments laid upon said shares, but, on the contrary, a special assessment of per cent on the par value of said shares had been theretofore duly imposed upon them by the directors of said company, which assessment had not been paid by defendant, but then remained [and still remains] a charge upon said shares [*or otherwise state specifically the particulars in which the representations were false*].

IV. That by reason of the premises the plaintiff has been misled, to his damage dollars.

WHEREFORE, etc.

864. Complaint for concealment of disease in a horse where fraudulent means were used to deceive the purchaser.

I. That on the day of, 19.., the defendant owned a certain horse which had theretofore contracted and then had a certain disease called which rendered it of no value, which fact defendant well knew but of which the plaintiff was ignorant.

II. That on said last named day the defendant offered to sell said horse to the plaintiff and for the purpose of inducing the plaintiff to purchase the same the defendant falsely and deceitfully used certain preparations and applications by which said horse was made to appear to be sound and well; by which means the plaintiff relying upon such appearance was induced to and did purchase said horse of defendant and pay him dollars therefor without warranty, believing said horse to be sound and well, whereas in truth and in fact said horse was unsound as aforesaid and of no value.

III. That plaintiff has suffered damage by reason of the premises in the sum of dollars.

WHEREFORE, etc.

865. Allegation that fraud was accomplished through an agent.¹

That on or about the day of, 19.., one R.... S.... was the agent of the defendant duly authorized to act for and on behalf of said defendant in respect to the business hereinafter named; and that on the said day the said R.... S.... in his said capacity as agent for the defendant and for the purpose of inducing the plaintiff to [*here state the purpose, as for instance, to purchase a certain horse the property of the defendant*] falsely and fraudulently represented to the plaintiff [*here state representations made*].

866. For false representations as to solvency made through a commercial agency.

I. That on or about the day of, 19.., the defendant falsely and fraudulently stated to a certain mercantile

¹ Where the representations are made by defendant's agent within the scope of his duty it is entirely sufficient to charge that the defendant made them, and proof that they were made by an agent

is admissible under this general allegation. If it is desired, however, to make the charge more specific some such words as these may be properly used.

agency, viz. [*name agency*] that [*here state representations made*] with intent thereby to procure credit from the plaintiff and other merchants, and to cause them to believe that he was entirely solvent and able to pay for such goods as he might buy, whereas in truth and in fact said defendant did not then [*here negative representations*] and that said defendant then knew said representations to be false.

II. That said representations were thereafter communicated to the plaintiff in the due and usual course of business as the defendant intended they should be, and that defendant relied thereon and was thereby induced to and did sell to the defendant upon credit the following goods and merchandise [*describe goods*] of the value of dollars.

III. That defendant has wholly failed to pay for said goods and is unable so to do, although the time of credit extended by the plaintiff has long since expired, and that the purchase price of said goods has been wholly lost to the plaintiff to his damage dollars.

WHEREFORE, etc.

866a. Complaint by insured against officers of insolvent insurance company, for false representations inducing plaintiffs to insure. (Sustained in Harper v. Chamberlain, 11 Abb. Pr. 234).²

I. That these plaintiffs are, and at all the times hereinafter mentioned were, partners in business, as manufacturers of at under the firm name of A.... B.... & Co.

II. That in the year 19.. a company known as [*name of corporation*] was organized in this state, for the purpose, among other things, of making insurance upon [vessels, freights, goods, wares, merchandise, specie, jewels, profits, commissions, bank-

² For a complaint for fraudulent representations as to the value of stock, whereby the plaintiff was induced to purchase it, see *Newberry v. Garland*, 31 Barb. 121; *Morse v. Swits*, 19 How. Pr. 271; *Mabey v. Adams*, 3 Bosworth, 346. In an action against promoters or officers of a corporation, for fraudulent representations as to its condition or solvency, the pleading must state what the false representation was; it must have been false, and so known to be to the defendant, and made with the intent and

with the effect of deceiving the plaintiff, and must have caused loss to him. It is not essential that the representation should be addressed directly to the plaintiff. If it were made with the intent of influencing every one to whom it might be communicated, or who might read or hear of it, the latter class of persons would be in the same position as those to whom it was directly communicated; but they must have come to a knowledge of it before their purchase. *Cazeaux v. Mali*, 25 Barb. 578. See post, Chapter LXXVI.

notes, bills of exchange, and other evidence of debt, bottomry and respondentia interests, and to make all and every insurance appertaining to or connected with marine risks, and risks of transportation and navigation; and to make insurance on dwelling-houses, stores, and all kinds of buildings, and upon household furniture, merchandise, and other property, against loss or damage by fire, and the risks of navigation and transportation].

III. That said company was pretended to be organized under the provisions of an act of the legislature of this state entitled "An Act to provide for the Incorporation of Insurance Companies."

IV. That, by the pretended charter of said company, it was provided that the business of said company should be conducted upon the plan of mutual insurance; and it was also provided that the capital of said company should be dollars; and it was also provided that the directors of said company might unite a cash capital of not less than nor more than dollars, as an additional security to the insured, above the fund of dollars, also mentioned in said charter; and it was also provided that the principal office of the company should be located in the city of New York.

V. That upon or after the organization of said company, and prior to the month of, 19.., the defendants, and each of them, were chosen trustees or directors of said company, and accepted and entered upon office as such; and the defendants, and each of them, were during said [month] and before and afterwards, trustees or directors of said company.

IV. That the defendants, as such directors or trustees of such company, fraudulently, and with the intent to induce these plaintiffs and others to make insurance with the said company, and pay them premiums for such insurances, did, at many times prior to, and during the first week of said [month] falsely publish, advertise, aver, and represent to the public at large, and to these plaintiffs, and to the confidential advisers of these plaintiffs, that the capital of said company was [*a sum largely exceeding the actual capital*]; and that said company was possessed of a paid-up capital of said last-mentioned sum; and that said company was solvent and responsible, and able to pay any losses to the amount of said last-mentioned sum; and they did fraudulently, and with like intent, prepare, and publish, and exhibit to these plaintiffs, and the confidential advisers of these plaintiffs, a form of policy containing a statement that the capital of said company was said last-mentioned sum; whereas the fact was, and these defendants well knew, that

said company had never raised, and never were possessed of a capital of said last-mentioned sum in any form; and that they had never raised, and never were possessed of any cash capital exceeding dollars; and that the said company never did raise a capital in any form of the value of even dollars.

VII. That these plaintiffs, confiding in the representations aforesaid made to them by the defendants, and confiding in the general reputation of said company, produced by the representations aforesaid made by defendants to the public at large, and being further advised thereto by the confidential advisers of these plaintiffs, who were misled by the representations aforesaid made to them by the defendants, and believing, in consequence of the premises, that the said company was possessed of an actual capital of dollars, paid in or secured in some of the ways prescribed by the provisions of the act of 1849, hereinbefore referred to, were induced to enter into a contract with said company for an insurance, as hereinafter stated, upon the material, stock, fixtures, and other property of these plaintiffs, used by them in their business, for one year from the day of, 19..; and these plaintiffs, confiding and believing as aforesaid, were induced by the premises to pay, and on or about the day of, 19.., did pay to the said company, and to the defendants as directors or trustees thereof, the sum of dollars as premium upon such insurance; and were induced by the premises to make said insurance with said company, instead of making it with other companies, of which there then were a great number, solvent, responsible, and willing to make such insurance on the property described in said policy.

VIII. That the said company did, on the day of, 19.., execute and deliver to these plaintiffs, their policy of insurance, a true copy whereof is hereto annexed, marked Exhibit A, whereby the said company, in consideration of dollars, to them paid by these plaintiffs, the receipt whereof was thereby acknowledged, did insure these plaintiffs against loss or damage by fire, to the amount of dollars, on their [printing and book materials, stock, paper, stereotype plates, fixtures, printed books, and steam-engine and machinery] contained in the premises in the city of described in said policy.

IX. That on the day of, 19.., the said [insured property] described in said policy of insurance, were by misfortune, and without fraud or evil practice, damaged, consumed, and lost by fire, not happening by means of any inva-

sion, insurrection, riot, or civil commotion, or any military or usurped power; and that, by the said fire, the said insured sustained loss and damage, in and by the consuming, damage, loss, and destruction of said property, to the amount of dollars, estimating the said loss at the true and actual value of the property at the time of the happening of said fire.

X. That, at the time of said fire, there were other insurances effected by these plaintiffs, as permitted by said policy, on the same property, to the aggregate amount of dollars only.

XI. That at the time of the making of said insurance, and from then until the fire above mentioned, these plaintiffs had an interest in the said property insured, as the owners thereof, and they were, and now are, the lawful owners and holders of the claim arising upon said policy and loss against the said company.

XII. That these plaintiffs duly fulfilled all the conditions of said policy of insurance upon their part, and did forthwith, after the said loss and damage by fire, give notice thereof to the said company, and did, as soon thereafter as possible, and on the day of, 19.., deliver to said company a particular statement of said loss and damage, subscribed by A.... B.... one of these plaintiffs, and duly verified by his oath; and these plaintiffs, on the day of, 19.., and at divers other times, duly demanded from said company payment of the sum of dollars and interest, due to them upon said policy by reason of said loss.

XIII. That said company have hitherto always neglected and refused to pay said loss; and these plaintiffs brought an action in the court of county against said company, to recover upon said policy for their loss sustained as aforesaid, and were put to great expense therein, and on the day of, 19.., recovered judgment therein for the full amount of their claim, and interest, and costs, to-wit, ... dollars, and caused execution to be issued thereon; which execution was, on the day of, 19.., returned wholly unsatisfied.

XIV. That by reason of the premises, these plaintiffs have sustained great damage, to-wit, ... dollars.

WHEREFORE, etc. [*demand judgment for money damages and costs*].

**866b. Complaint by bank depositor against directors for fraudulent published statements inducing deposit.
(Adapted from Salomon v. Bates, 118 N. C. 311).**

I. That the defendants are and were at the times hereinafter named directors of the Bank, which was and is a bank-

ing corporation organized and existing under the laws of the state of

II. That said corporation commenced to do a general banking business at the city of in said state on or about the day of, 19.., and thereafter continued in said business under the management of the defendants as directors, and became insolvent to the knowledge of the defendants in or about the month of, in the year 19..

III. That notwithstanding such insolvency, the said bank continued to transact its said banking business under the management and control of said defendants, and the said defendants caused to be made and published annual statements of the condition of said bank showing the said bank to be solvent, its capital unimpaired, and that it possessed a surplus, and particularly that the said directors caused a certain semi-annual statement of the condition of said bank to be made and sworn to by the president and cashier on or about the day of, 19.., and caused the same to be published upon said day in two certain newspapers of large circulation in the said city of, to-wit [*name newspapers*]; that at the time of the making and publishing of said last-named statement the said bank was in fact totally insolvent and unable to pay its obligations, to the knowledge of said defendants, but that notwithstanding that fact the said statement showed said bank to be solvent, its capital unimpaired, and that it had a net surplus of dollars. That the said statement was so fraudulently made and published by the defendants for the purpose of establishing the credit of said bank, and to induce the public to deal therewith and deposit money therein.

IV. That the plaintiff, being ignorant of the real condition of said bank, saw and read the said statement and believed the same to be true, and relying thereon deposited in said bank in the month of, 19.., the sum of dollars, and allowed the said sum to remain therein. That the said bank closed its doors and ceased to do business on the day of, 19.., that its entire property has been sequestered and its business closed up, and that the plaintiff has been paid upon his said demand the sum of dollars and no more, and that there is yet due to the plaintiff upon said claim the sum of dollars, with interest from, 19.., which sum has been wholly lost to the plaintiff.

WHEREFORE the plaintiff demands judgment against the defendants for the sum of [*amount lost*] with interest from, 19.., with costs:

866c. Complaint against officers of a corporation for issuing a false prospectus inducing purchase of stock.

I. That the X.... Y.... Company is and was at the times hereinafter stated, a corporation organized and existing under the laws of the state of for the purpose of [*state business*] and that the defendants are and have been since the month of, 19.., directors of the said corporation.

II. That the said defendants, in the month of, 19.., for the purpose of inducing the public to purchase stock in said company, prepared and caused to be printed and circulated among the public at [*or published in the Q.... Z.... a newspaper of wide circulation in the city of*] a certain prospectus or statement, signed by them, of which a true copy is hereto attached and made part hereof, marked Exhibit A [*or set forth the exact representations contained in the statement*].

III. That the plaintiff had no knowledge as to the truth of the statements contained in said prospectus, and that he received a copy thereof [*or read the same in said newspaper*] on or about the day of, 19.., and believed, and relied on the truth of the representations therein contained, and so relying, and not otherwise, the plaintiff was thereby induced to and did on the day of, 19.., purchase of said company shares of its capital stock, and paid therefor dollars.

IV. That the said representations and statements contained in said prospectus were each and all false, and that the defendants knew that the same were false when they issued the same as aforesaid. That the said company did not at that time own a valuable copper mine, and did not [*here negative specifically each of the false statements complained of*] but that [*here state the truth with regard to the various representations*].

V. That said company is now insolvent, and that the stock thereof, including plaintiff's said stock, is worthless [*or, worth not exceeding dollars per share*] and that plaintiff has suffered damage by reason of his said purchase to the amount of dollars.

WHEREFORE plaintiff demands judgment for said sum of dollars, with interest from, 19.., and costs.

CHAPTER XLVI.

COMPLAINTS FOR CONVERSION OF PERSONAL PROPERTY.

- | | |
|---|--|
| <p>867. By owner for conversion, where defendant wrongfully takes possession.</p> <p>868. The same, where defendant rightfully obtained possession.</p> <p>869. The same, by assignee after conversion.</p> | <p>870. The same, by an administrator.</p> <p>871. For conversion of goods bought under fraudulent representations.</p> <p>872. For conversion of a promissory note.</p> <p>873. For conversion of a bond, by assignee after conversion.</p> |
|---|--|

867. By owner for conversion, where defendant wrongfully takes possession.

I. That before and until the time hereinafter mentioned the plaintiff was the owner and in possession of [*very briefly designate the goods, or where he was not in possession, say: was entitled to the immediate possession of, designating the goods, or attach and refer to schedule of goods*] of the value of dollars.

II. That on the day of, 19.., at the defendant unlawfully took and converted the same to his own use, to the plaintiff's damage dollars.

WHEREFORE, etc.

868. The same, where defendant rightfully obtained possession.

I. That before and until the times hereinafter mentioned the plaintiff was the owner and entitled to the immediate possession of [*designating the goods*] of the value of dollars.

II. That on the day of, 19.., the plaintiff delivered the said goods to the defendant for safekeeping and upon the defendant's promise to return the same to the plaintiff upon demand [*or otherwise state the facts showing the lawful possession thereof by defendant*].

III. That on or about the day of, 19.., the plaintiff duly demanded of the defendant that he return said goods to the plaintiff¹ but that the defendant refused and still

¹ Demand and refusal are necessary to be alleged and proven where defendant came rightfully into possession.

refuses to return the same and has wrongfully and unlawfully converted the same to his own use, to the plaintiff's damage in the sum of dollars.

WHEREFORE, etc.

869. The same, by assignee after conversion.

I. That before and until the times hereinafter mentioned, one M.... N.... was the owner and lawfully possessed of [*very briefly designate the goods*] [*or, was entitled to the immediate possession of, designating the goods, etc.*] of the value of dollars.

II. That on the day of, 19.., at the defendant unlawfully took and converted the same to his own use, to the damage of said M.... N...., ... dollars.

III. That on the day of, 19.., said M.... N.... duly assigned to the plaintiff for value his claim against the defendant for damages for said conversion.

WHEREFORE, etc.

870. The same, by an administrator.

I. [*As in last preceding form.*]

II. That on the day of, 19.., the same came into the possession of the defendant, who though on the day of, 19.., requested so to do by said M.... N.... [*or by the plaintiff*] would not deliver the same to him, but then and ever since wrongfully detained the same.

III. That thereafter and before this action [*or on the day of, 19..*], said M.... N.... died intestate, and on the day of, 19.., letters of administration upon the estate of said M.... N.... deceased were duly issued and granted to the plaintiff by the court of the county of of this state, appointing the plaintiff administrator of all the goods, chattels and credits which were of said deceased, and that the plaintiff thereupon duly qualified as such administrator, and entered upon the discharge of the duties of his said office and is still such administrator.

IV. That by reason of the premises the said plaintiff in his capacity as administrator aforesaid has suffered damages in the sum of dollars.

WHEREFORE, etc.

871. For conversion of goods bought under fraudulent representations.

[*Allege the fraudulent sale as in I, II, and III of Form 853.*]

IV. That the defendant, having so obtained from the plaintiff the possession of said goods, unlawfully converted and dis-

posed of them to his own use, to the damage of the plaintiff
..... dollars.

WHEREFORE, etc.

872. For conversion of a promissory note (Decker v. Matthews, 52 N. Y. 313).

I. That on the day of, 19.., at, the plaintiff made his promissory note, of which the following is a copy [*or, his promissory note dated on that day, whereby he promised to pay dollars to the order of M.... N.... months from date*] which note was made and delivered by the plaintiff to M.... N.... without consideration, and for his accommodation, and with the special purpose and agreement between the plaintiff and said M.... N.... that it should be offered by said M.... N.... to the O.... P.... Bank for discount, and the proceeds thereof, if any, should be applied by said M.... N.... to the payment of a certain other note theretofore made by the plaintiff for the accommodation of said M.... N...., dated, etc. [*describing note*] and that otherwise it should be returned to this plaintiff.

II. That said first mentioned note was thereafter offered by said M.... N.... to the O.... P.... Bank for discount, who refused to discount the same, and returned it to the said M.... N.... whereupon the plaintiff became entitled to the possession thereof [*or state other circumstances showing failure in the intended appropriation of the note, as the fact was*].

III. That thereafter, but before the maturity of the note, the defendant W.... X.... without the knowledge or consent of the plaintiff or of M.... N.... unlawfully took said note from the possession of M.... N.... and delivered it to the defendant Y.... Z....; and that the defendants thereupon wrongfully converted and disposed of it to their own use, by transferring it to a purchaser, in good faith for value, before its maturity [*or, converted and disposed of it to their own use, whereby the plaintiff was compelled to pay it*], to the damage of the plaintiff
..... dollars.

WHEREFORE, etc.

873. For conversion of a bond, by assignee after conversion.

I. That in or about the month of, 19.., at, one M.... N.... being the owner of a bond, a copy of which is annexed as a part of this complaint, by his agent, at the request of the defendant, deposited it with the defendant for the purpose of enabling him to ascertain the value thereof, upon an agreement between him and the said M.... N.... that on as-

certaining the value he would either buy the same from the said M.... N.... and pay him the value thereof, or would return it to him upon demand.

II. That after a reasonable time for ascertaining the value thereof, and on the day of, 19.., at, said M.... N.... duly demanded from the defendant the said bond, or the value thereof; but the defendant, though admitting that it was in his custody or under his control, refused either to return it or to pay its value to the said M.... N.... to his damage dollars.

III. That on the day of, 19.., at, the said M.... N.... duly assigned to the plaintiff the said bond, together with all his right of action against the defendant and all other persons, to recover its value, or its possession, or said damages.

IV. That the value of said bond, at the time of the commencement of this action, was dollars.

WHEREFORE, etc.

CHAPTER XLVII.

COMPLAINTS FOR INJURIES TO PERSONAL PROPERTY.

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|---|--|
| <p>874. For unlawfully taking and carrying away plaintiff's goods (trespass).</p> <p>875. The same, the plaintiff having regained possession before suit brought.</p> <p>876. By mortgagee entitled to possession, against sheriff for selling chattels on execu-</p> | <p>tion against the mortgagor.</p> <p>877. For malicious injury to property.</p> <p>878. Against city or county, for damage done by mob or riot.</p> <p>879. For chasing plaintiff's cattle.</p> <p>880. For shooting plaintiffs' dog.</p> |
|---|--|

874. For unlawfully taking and carrying away plaintiff's goods (trespass).

That on the day of, 19.., at, the defendant unlawfully took from the possession of the plaintiff, and carried away [*here briefly designate the goods*] which were then and there the property of the plaintiff of the value of dollars [and still unlawfully detains the same from the plaintiff, or destroyed the same] to his damage dollars.

WHEREFORE, etc.

875. The same, the plaintiff having regained possession before suit brought.

I. That on the day of, 19.., at, the defendants unlawfully took from the possession of the plaintiff, and carried away [*here very briefly designate the goods*] the property of the plaintiff, of the value of dollars, and unlawfully detained the same from the plaintiff until the day of, 19..

II. That by reason of such unlawful taking and detention of said property, the plaintiff was injured to his damage dollars. [*Or, was compelled to pay, and did on the day of, 19.., at, pay dollars to X.... Y.... to obtain the return of the same, and also dollars for recartage and reweighing, and sustained other injury, to his damage dollars*]. [*Or state any other special damage sustained, such as loss of usable value.*]

WHEREFORE, etc.

876. By mortgagee entitled to possession against sheriff for selling chattels on execution against the mortgagor.¹

I. That on or about the day of, 19.., one M.... N.... executed and delivered to the plaintiff a chattel mortgage [of which a copy is annexed as a part of this complaint]; that the property mentioned and described in said mortgage and the schedule annexed consisted of a lithographic press, of the value of dollars, or thereabouts; that said mortgage was made in good faith, and without intent to defraud creditors or purchasers, and was given to secure the payment to plaintiff of dollars, with interest from the date of said mortgage, which sum was theretofore loaned by the plaintiff to said M.... N.... and which he then owed the plaintiff.

II. That the said M.... N.... is by trade or occupation a lithographer, and was at the date of said mortgage, actively engaged in business as a lithographer, and was dependent upon said business or occupation for support and a livelihood; and that the said property so mortgaged was used by the said M.... N.... in the course of said business or occupation, and was essential and requisite to him in his said business or occupation; and that said property was left and remained with the said M.... N.... to enable him to prosecute his said business.

III. That on or about the day of, 19.., a true copy of said mortgage was filed in the office of in which said county, at the date of said mortgage, the said M.... N.... resided.

IV. That on the day of, 19.., and before the levy and sale hereinafter mentioned, said sum of dollars, with interest, became due, pursuant to the terms of the mortgage [*or if on demand*, the said sum of dollars, with interest, was duly demanded from the said M.... N.... by the plaintiff] but said M.... N.... failed to pay the same; and thereupon, pursuant to said mortgage, the plaintiff became the owner of said property, and entitled to the immediate possession and control of the same.

V. That thereafter, and on or about the day of, 19.., the defendant W.... X.... issued to the defendant Y.... Z...., sheriff of the county of, an execution against the property of the said M.... N....; and on the day of, 19.., the plaintiff caused a notice to be served upon said sheriff, informing him of said mortgage, and of the

¹Taken from 1 Abbott's Forms, on Hull v. Carnley, 1 Abb. Pr. p. 463, Form 558, which was based 158.

default in the payment thereof, and that the plaintiff claimed the property therein mentioned.

VI. That on or about the day of, 19.., regardless of said mortgage, the said sheriff wrongfully sold said [*mortgaged property*]; and thereafter returned said execution satisfied.

VII. That the said W.... X.... directed said sheriff to make such levy and sale without regard to said mortgage, and agreed to indemnify him against any and all damage that might arise from said levy and sale; and that after said sale he received the proceeds, or a portion thereof, to his own use and benefit.

VIII. That since said sale the plaintiff has demanded of said sheriff the mortgaged goods, but he refused to deliver the same; and that thereupon the plaintiff demanded of the said sheriff the proceeds, or value thereof of said property, but he refused to pay over any part thereof.

IX. That by reason of the premises the plaintiff has been injured, to his damage dollars.

WHEREFORE, etc.

877. For malicious injury to property.

That on the day of, 19.., at, the defendant, wilfully and maliciously intending to injure the plaintiff, cut, broke, mutilated, and defaced [*or state other injury*] certain [*very briefly designating the things*] the property of the plaintiff, of the value of dollars, and wholly destroyed the same [*or, and greatly injured them, so that the plaintiff was obliged to expend dollars in repairing the same*], to his damage dollars.

WHEREFORE, etc.

878. Against city or county, for damage done by mob or riot.²

I. That at and before the times hereinafter mentioned the plaintiff was the owner and occupant of the store and basement, with appurtenances, known as No. in street, in the city of [*or the town of in the defendant county*] and therein he conducted a business as a gunsmith, and dealer in guns, pistols, gun materials and fittings, and military equipments, fishing tackle, apparatus, and equipments, and then and there owned and had a large stock of such goods and merchandise in his possession.

² An action of this nature is authorized by Wis. Stats. 1898 sec. 938. It must be brought within six months after the injury, and

the plaintiff must have notified the mayor or sheriff of the danger if he have opportunity after threats are made. *Long v. Neenah*, — Wis. — s.c. 107 N. W. 10.

II. That on the day of, 19.., and less than six months before the commencement of this action, a mob of disorderly and riotous persons collected together in said city [or town] and created a riot.

III. That on said day the rioters broke into the plaintiff's said store and premises, and carried away therefrom and destroyed a large portion of his said goods and merchandise and destroyed the windows of said store [*or otherwise state injuries done to real and personal property, according to the facts*]. [That a number of articles he was able to and did save from the rioters, by concealing them in the said basement. That he used all diligence to prevent the breaking open of his store and the destruction and injury of his aforesaid property, but was unable to prevent the same]. And that he was not apprised of any threat or attempt by said mob to destroy his property prior to the breaking in of his said store.

IV. That the said defendant city [or county] though having due notice of the said riot immediately upon its breaking out, did not protect the plaintiff's property, but neglected so to do.

V. That the value of said goods and chattels so destroyed or injured by the said rioters was dollars, after deducting the value of all goods returned to him by the police, as retaken from the rioters; and he also sustained dollars damage, by the breaking of his store, and injury to the building, and the breaking up of his business for days thereafter by reason of the destruction of his stock of goods.

WHEREFORE, etc.

879. For chasing plaintiff's cattle.

That on the day of, 19.., at, the defendant chased and drove about [*designate the cattle*] of the plaintiff, of the value of dollars, whereby they were greatly damaged and injured, and of them were killed [*or bruised, according to the facts*] to the damage of the plaintiff dollars.

880. For shooting plaintiff's dog.

That on the day of, 19.., at, the defendant maliciously shot and killed a dog, the property of the plaintiff, of the value of dollars, to the damage of the plaintiff dollars.

CHAPTER XLVIII.

COMPLAINTS IN REPLEVIN.

- | | |
|---|---|
| 881. By owner against wrong-doer for goods wrongfully taken. | session was not wrongful (general form). |
| 882. The same, where special damages are sought to be recovered. | 886. The same, another form. |
| 883. The same, for goods taken from plaintiff's lessee or bailee. | 887. By seller against a fraudulent buyer of goods. |
| 884. The same, for goods taken from plaintiff's assignor. | 888. The same, joining transferee as defendant. |
| 885. By owner for wrongful detention when original pos- | 889. By one having special property in goods. |
| | 890. Against sheriff for exempt property seized on execution. |

As actions to recover the possession of specific personal property are commonly called actions in replevin, the term is retained in the heading of this chapter as matter of convenience, although not strictly accurate in most of the code states. In none of the states covered by this work [except Iowa] is any writ issued upon the complaint, but the provisional remedy of immediate claim and delivery of the property sought is obtained by affidavit and undertaking at the plaintiff's option. [See Chapter XII for forms of the provisional remedy.] In Iowa a writ of replevin is issued upon the petition and a form for such petition will be found in Chapter XII, Form 357.

881. By owner against wrong-doer for goods wrongfully taken.

I. That at the time hereinafter mentioned, the plaintiff was the owner and lawfully possessed of [*briefly designate the goods*], of the value of dollars, and still is the owner thereof.

II. That on the day of, 19.., the defendant wrongfully took said goods and chattels from the possession of this plaintiff, and still unjustly detains the same, to the damage of the plaintiff dollars.

WHEREFORE this plaintiff demands judgment against the defendant for the recovery of the possession of said goods and chattels, or for the sum of dollars, the value thereof,

in case a delivery cannot be had; together with dollars his damages, and for his costs.

882. The same, where special damages are sought to be recovered.

[Under last preceding form general damages only can be recovered; if it is desired to recover special damages in addition, the facts showing same should be alleged as for instance]:

IV. That the reasonable value of the use of said property during the time the same has been so unjustly detained by the defendant is the sum of dollars *[or state other facts showing special damages, such as injury to the property]*.

WHEREFORE, etc. *[as in last preceding form]*.

883. The same, for goods taken from plaintiff's lessee or bailee.

I. That at the time hereinafter mentioned the plaintiff was, and still is, the owner of *[briefly designate the goods]* of the value of dollars; which goods were then in the possession of one M.... N.... to whom the plaintiff had leased the same for a certain term *[or, with whom the plaintiff had deposited the same for storage, or otherwise, according to the fact]*.

II. That on the day of, 19.., at, the defendant wrongfully took said *[goods]* and chattels from the possession of said M.... N.... and still unjustly detains the same, to plaintiff's damage dollars.

[III. That before this action said term expired, and thereupon the plaintiff became entitled to the immediate and exclusive possession of said goods].

WHEREFORE, etc. *[as in preceding forms]*.

884. The same, for goods taken from plaintiff's assignor.

I. That at the time hereinafter mentioned one M.... N.... was the owner and lawfully possessed of *[briefly designate the goods]* of the value of dollars.

II. That on the day of, 19.., at, the defendant wrongfully took said *[goods]* from the possession of said M.... N.... and ever since has unjustly detained the same, to the damage of said M.... N.... in the sum of dollars.

III. That on the day of, 19.., said M.... N.... duly sold and assigned to the plaintiff said *[goods]* and his claim to damages for said taking and detention.

WHEREFORE, etc. *[as in preceding forms]*.

885. By owner for wrongful detention when original possession was not wrongful (general form).

I. That at the time hereinafter stated the plaintiff was and still is the owner and entitled to the immediate possession of the following described personal property [*describe same*] of the value of dollars.

II. That defendant is in possession of said property and wrongfully detains the same from plaintiff, in the county and state aforesaid, and has so detained it ever since the day of, 19.., to the damage of plaintiff dollars.

[III. That on the day of, 19.., the plaintiff demanded of the defendant that he deliver said property to the plaintiff, but defendant refused so to do].¹

WHEREFORE, etc. [*as in first form in this chapter*].

886. The same, another form.

I. [*As in first form in this chapter.*]

II. That on the day of, 19.., at, one M.... N.... [*or, certain persons to the plaintiff unknown*] wrongfully took said goods and chattels from the possession of the plaintiff [*or otherwise*] and unjustly detained the same.

III. That thereafter the same came to the possession of the defendant, who refuses to deliver them to the plaintiff, although, before this action, to-wit, on the day of, 19.., by the plaintiff duly requested so to do; but, on the contrary, still unjustly detains them from the plaintiff, to his damage dollars.

WHEREFORE, etc.

887. By seller against a fraudulent buyer of goods.

I. That on the day of, 19.., at, the defendant with intent to deceive and defraud the plaintiff by inducing the plaintiff to sell and deliver the goods hereinafter named to him falsely and fraudulently represented to the plaintiff that he, the defendant, was solvent and was worth the sum of dollars over and above all his liabilities [*or otherwise, according to the fact*].

¹ Where only wrongful detention is alleged it is usual to plead demand and refusal, although it is held to be unnecessary because demand and refusal are simply facts showing wrongful detention, which is the ultimate essential fact. *Oleson v. Merrill*, 20 Wis. 462;

Guthrie v. Oleson, 44 Minn. 404. Where, however, demand and refusal are the facts relied upon to prove wrongful detention it is well to plead them in order to force an admission from the defendant and thus simplify the issues.

II. That the plaintiff relying on said representations and believing the same to be true, was thereby induced to sell and deliver, and did sell and deliver to the defendant [*briefly designate the goods*] upon credit, and that the said goods were and are of the value of dollars.

III. That the said representations were false and untrue in fact in that [*here state particularly in what respect*] and were then known by the defendant to be false.

IV. That no part of the purchase price of said goods has been paid, and that on the day of, 19.., the plaintiff notified defendant that he disaffirmed said sale and demanded that defendant return to plaintiff the possession of said goods, but that defendant refused so to do [*or if part of purchase price has been paid allege offer to return the same or tender*].

V. That the defendant, having so obtained from the plaintiff the possession of said goods, wrongfully detains them from the plaintiff, to his damage dollars.

[*Add allegations showing special damage, if any.*]

WHEREFORE, etc. [*as in first form in this chapter*].

888. The same, joining transferee as defendant.

[*Allegations I, II, III and IV as in last preceding form.*]

V. That the said [*buyer*] afterwards transferred said goods to the defendant Y.... Z.... who wrongfully detains them from the plaintiff.

VI. That on the day of, 19.., at, the plaintiff demanded of said Y.... Z.... that he deliver the same to him, but said Y.... Z.... refused so to do, to his damage dollars.

WHEREFORE, etc.

889. By one having special property in goods.

I. That the plaintiff at the times hereinafter mentioned had and still has a special property and ownership in the following described goods and chattels, to-wit, [*describe property*] resulting from the fact that on the day of, 19.., the plaintiff hired said goods [*or property*] from one M.... N.... the owner thereof, for the term of months and paid said M.... N.... the sum of dollars for the use thereof during said term; and that the said term has not yet expired, and the plaintiff is entitled to the immediate possession of said goods [*or property*].

[*Allege wrongful detention and damages, as in previous forms.*]

WHEREFORE, etc.

**890. Against sheriff for exempt property seized on execution
(sustained in Johnson v. Neal, 32 Nebr. 14 s.c. 48 N.
W. 897).**

I. That the defendant was the duly appointed and qualified sheriff of county, Nebraska, from the day of, 19.., to the day of, 19..

II. That the plaintiff is the owner and is entitled to the possession immediately of the following described goods and chattels, to-wit [*description*] being the same now in the possession of the said defendant, and which he still holds, of the value of dollars.

III. That the defendant wrongfully detains the said goods and chattels from the possession of the plaintiff and has wrongfully detained the same, to his damage of dollars.

IV. That said property was seized by the defendant as sheriff of said county, under an execution issued on a judgment against the plaintiff, but consisted of articles exempt from execution; that the plaintiff was, at the time of the levying of the said execution and still is, a resident of this state, and the head of a family; that he has neither lands, town lots nor houses subject to exemption as a homestead, and is engaged in the business of agriculture.

WHEREFORE, etc.

CHAPTER XLIX.

COMPLAINTS FOR BREACH OF CONTRACTS FOR SALE OF REAL ESTATE.

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|--|---|
| 891. Purchaser against vendor. | 895. Allegation of rescission by defendant, excusing plaintiff's non-performance. |
| 892. The same, coupled with claim for redelivery of securities for purchase money. | 896. Allegation of false representations by defendant, excusing plaintiff from tendering payment. |
| 893. Against purchaser, for not fulfilling agreement to purchase. | |
| 894. Against purchaser at auction for deficiency on resale. | |

891. Purchaser against vendor.

I. That on the day of, 19.., the defendants and the plaintiff entered into a contract in writing, subscribed by the defendants, whereby it was mutually agreed that the said defendants should sell to the plaintiff certain premises known as in for the sum of dollars, to be paid therefor by this plaintiff; that the defendants should make a good title to the said premises, clear of all incumbrances, and deliver a deed thereof on the day of, 19..; and that the plaintiff should thereupon pay to the said defendants the said sum [*or attach copy of agreement*].

II. That the plaintiff duly performed all the conditions of said contract on his part.

III. That the defendants did not on said day of, nor have they at any other time whatsoever given him a deed of the premises pursuant to the agreement, but refused, and wholly failed to do so, to his damage dollars.

Or: III. That there is a mortgage upon the said property, made by O.... P.... to Q.... R.... for dollars, which was recorded in the office of on the day of, 19.. [*or, of which the plaintiff then had notice*], and which then was and still is an incumbrance on said title [*or state any other defect of title*]; and that the defendant could not, and did not make good title pursuant to his agreement, to the damage of the plaintiff dollars.

WHEREFORE, etc.

892. The same, coupled with claim for redelivery of securities for purchase money (*Holmes v. Holmes*, 9 N. Y. 525).

First. For a first cause of action.

I. That on the day of, 19.., this plaintiff and the defendant entered into an agreement in writing, under their hands and seals, whereby the defendant agreed to sell to the plaintiff the farm the defendant then resided on, in the town of in the county of and containing acres, or thereabouts, for the sum of dollars per acre; and that he would, on the 1st day of May then next ensuing, at the county clerk's office, in the town of Poughkeepsie, between the hours of eight o'clock in the morning and six in the evening, on receiving from the plaintiff the sum of dollars per acre, at his own expense execute a proper conveyance for conveying the fee simple of said premises to this plaintiff free of all incumbrances; and that plaintiff agreed that he would, at the time and place above mentioned, on the execution of such conveyance, pay to the defendant the sum of dollars per acre as aforesaid; and that in said agreement the defendant acknowledged the payment by the plaintiff of \$1000 in part payment of said premises; and further agreed to take a bond conditioned for the payment of six thousand dollars, secured by a mortgage on said premises in payment of \$6000 of the purchase-money, said bond and mortgage to be payable in one year from said 1st day of May, and to bear interest at six per cent per annum; and further agreed to pay this plaintiff, on failure of performance, one thousand dollars liquidated damages.

II. That on the [*day agreed*] at [*the place agreed*] the plaintiff was ready and willing to fulfill the agreement on his part in all respects [*or where a tender was necessary*: That on the day of, 19.., at, the plaintiff was ready and willing to fulfill the agreement on his part in all respects, and then and there offered to the defendant to accept a conveyance of the premises, and tendered to the defendant a bond and mortgage drawn and executed pursuant to the agreement, and the residue of the purchase-money in cash] and otherwise has duly performed all the conditions of said agreement on his part.

III. That the defendant refused to convey the said premises, pursuant to the agreement, and he then could not and cannot now convey a good title to the farm free of all incumbrances, but on the contrary, the same was and still is subject to various defects and incumbrances, and in particular to a lease made by him to the trustees of the school district for the erection and

use of a school-house, and to the inchoate right of dower of the wife of one G.... H.... who is still living; wherefore the defendant failed to perform his agreement, to the damage of the plaintiff one thousand dollars.

Second. And for a second cause of action the plaintiff alleges:

IV. That the payment of \$1000 hereinbefore stated to have been made by the plaintiff to the defendant, in pursuance of the said agreement, was made by a negotiable promissory note for that amount, made by this plaintiff, payable to the order of one W.... H...., and indorsed by him, which note was delivered to the defendant, and accepted by him in payment of said sum of one thousand dollars; and still remains in his possession.

WHEREFORE the plaintiff demands judgment against the defendant: 1st, for the sum of one thousand dollars; and 2nd, that he be required to cancel and deliver up to the plaintiff said note.

893. Against purchaser, for not fulfilling agreement to purchase.

I. That on the day of, 19.., at, the plaintiff and the defendant entered into an agreement in writing, under their hands and seals, of which the following is a copy: [*copy of the contract*].

Or: I. That on the day of, 19.., at, the plaintiff and defendant mutually agreed that the plaintiff should sell to the defendant, and that the defendant should purchase from the plaintiff [*briefly designate the premises*] in the town of county of and state of for dollars, payable [*specifying terms*].

II. That on the day of, 19.., at, the plaintiff tendered [*or, was ready and willing, and offered to execute*] to the defendant a sufficient deed of the said premises on payment of the sum [*or otherwise, according to the contract*] and still is ready and willing to execute the same; and otherwise has duly performed all the conditions thereof on his part.

III. That the defendant neglected to comply with the terms of the agreement on his part, and wholly failed to pay the purchase-money, to the damage of the plaintiff dollars.

WHEREFORE, etc.

894. Against purchaser at auction, for deficiency on resale.

I. That this plaintiff, being the owner in fee of twenty-six lots of land, in the ward of the city of put them up

for sale by auction, at the in the city of on the day of, 19.., and announced before the commencement of the sale, as a part of the terms of sale, that ten per cent of the purchase-money was on the day of sale to be paid by the purchaser to the plaintiff, and to the auctioneer the auctioneer's fee of ten dollars on each lot; and that if any purchaser failed to make such payments, the lot would be resold, and he be charged with the deficiency.

II. That at the said sale, C.... D...., the defendant, bid in and became the purchaser of eight lots [*describing same*], for the price of dollars for each lot.

III. That the said defendant did not, on the day of sale, or at any other time, pay ten per cent, or any part of the price bid, or the purchase-money, or auctioneer's fees, or any part thereof.

IV. That in consequence of such neglect of payment, and after previous notice given to the defendant of the time and place of resale, and that he would be charged with the deficiency, the said lots were put up to resale, and resold at the price of dollars for each lot, making a deficiency of dollars upon the eight lots.

WHEREFORE, etc.

895. Allegation of rescission by defendant, excusing plaintiff's non-performance (North v. Pepper, 21 Wend. 636).

That on the day of, 19.., and before the time for the plaintiff to perform the conditions thereof on his part, the defendant gave notice in writing to the plaintiff that he had determined not to take the land, and the defendant abandoned the agreement, and ever since wholly failed to perform it, to the plaintiff's damage dollars.

896. Allegation of false representations by defendant, excusing plaintiff from tendering payment (Clark v. Crandall, 7 Barb. 169).

That on or about the day of, 19.., and before the time for performance on the part of the plaintiff had arrived, the defendant, for the purpose of preventing the plaintiff from being ready to receive the said and pay therefor, falsely and fraudulently represented to the plaintiff that he had sold said to other persons; and that relying on said representations, and solely by reason thereof, the plaintiff did not provide the means, and was not prepared to receive and pay for the same, as he otherwise would have done

CHAPTER I.

COMPLAINTS AGAINST AGENTS AND BAILEES FOR BREACH OF DUTY.

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| <p>897. Against an agent for not using diligence to sell goods.</p> <p>898. The same, for carelessly selling to insolvent.</p> <p>899. The same, for selling for worthless paper.</p> <p>900. The same, for breach of instructions as to sale.</p> <p>901. Against an auctioneer, for selling below the seller's limit.</p> <p>902. Against the same, for selling on credit.</p> <p>903. Against an auctioneer, or agent, for not accounting.</p> <p>904. Against a bank, for neglecting to present a note lodged with it for collection.</p> <p>905. The same, for not giving due notice.</p> | <p>906. By sheriff against a receiptor.</p> <p>907. Against bailee, for not taking care of and returning goods.</p> <p>908. Against a watchmaker, for not using due care and skill in repairing.</p> <p>909. The same, for not returning the watch.</p> <p>910. For negligence in loading a cargo.</p> <p>911. For immoderately driving a horse.</p> <p>912. For driving on a different journey from the agreed.</p> <p>913. Against the hirer of furniture, etc., for not taking care of the same.</p> |
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897. Against an agent for not using diligence to sell goods.

I. That on the day of, 19.., at, the defendant undertook and agreed to sell for the plaintiff, as his agent, and for a compensation to be thereafter paid * certain goods of the plaintiff, to-wit [*very briefly designate them*], of the value of dollars; and thereupon received the same from plaintiff for that purpose.

II. That the defendant did not use due diligence to sell, or in selling the same, ** but unreasonably delayed so to do, and by reason thereof the same being afterwards sold by the defendant for the plaintiff produced dollars less than the same would have produced had the defendant used such due diligence to sell, and in selling the same; and thereby, also the same became much wasted and deteriorated in value, and the plaintiff incurred dollars expenses in warehousing the same, to his damage dollars.

WHEREFORE, etc.

898. The same, for carelessly selling to insolvent.

[*Proceed as in preceding form to the **, continuing*]: but negligently sold the said for the plaintiff to one M.... N.... who was then insolvent to the knowledge of defendant, without receiving any part of the price therefor, or taking security for the payment thereof; whereby the plaintiff has wholly lost said goods and the purchase price thereof, to his damage dollars.

WHEREFORE, etc.

899. The same, for selling for worthless paper.

I. [*As in first form in this chapter, inserting at the **]: for cash, or an approved bill or note at sixty days or less, and not otherwise [*or according to the fact*].

II. That the defendant did not use due diligence in selling the same, but negligently and knowingly sold the same for a bill of exchange made by one M.... N.... an insolvent person, which bill is worthless and of no value to the plaintiff, and although the same became payable before this action, is unpaid, to the damage of the plaintiff dollars.

WHEREFORE, etc.

900. The same, for breach of instructions as to sale.

I. That on the day of, 19.., at, the plaintiff employed the defendant, for a compensation, to sell hogsheads of sugar of the value of dollars, for the plaintiff; and that he received the same from the plaintiff for that purpose.

II. That in consideration of the premises, the defendant then promised the plaintiff to use due diligence to sell, and in selling the same for the plaintiff, and in obeying the reasonable directions of the plaintiff in regard to the sale thereof.

III. That the plaintiff afterwards, on or about the day of, 19.., directed the defendant to sell said sugar at the price of and not less, in case the same could be obtained by using reasonable diligence in that behalf.

IV. That said direction was a reasonable one, and the defendant, by using reasonable diligence, might and ought to have obtained that price for the sugar.

V. That the defendant did not use due and reasonable diligence in obeying said direction, and neglected to sell the said sugar according thereto, and by reason thereof, and said sugar being afterwards sold by the defendant for the plaintiff, produced dollars less than it would have produced had the defendant used such due diligence to sell, and in selling the

same; and thereby, also, the said sugar became much wasted and deteriorated in value, and the plaintiff incurred dollars expenses in warehousing the same, to his damage dollars.

WHEREFORE, etc.

901. Against an auctioneer, for selling below the seller's limit.

I. That the defendant being engaged at in the business of an auctioneer, in consideration that the plaintiff would deliver to him [*very briefly designate the goods*] to be sold by him for the plaintiff for a compensation, undertook, on or about the day of, 19.., to sell the same * at and for no less money than the sum of dollars, and not to sell them otherwise.

II. That the plaintiff accordingly delivered said goods to the defendant for that purpose.

III. That the defendant, without the consent of the plaintiff, sold them for less than the aforesaid sum, to-wit, for dollars, to the damage of the plaintiff dollars.

WHEREFORE, etc.

902. Against the same, for selling on credit.

[*I and II as in preceding form, substituting at the **]: for cash, and not otherwise.

III. That the defendant afterwards sold said goods on credit without the plaintiff's consent, whereby the plaintiff has hitherto lost their value, to-wit, the sum of dollars, to his damage dollars.

WHEREFORE, etc.

903. Against an auctioneer or agent, for not accounting.

I. [*Allege agency, as in preceding form, or thus*]: That heretofore [and on or about the day of, 19..] the plaintiff shipped from consigned to the defendant, then his agent, at to sell for cash [*very briefly designate the goods*] of the value of dollars, of which consignment said defendant had notice, and which agency, for a valuable consideration, he undertook and entered upon.

II. That the defendant received said goods [and thereafter sold the same, or some part thereof] on account of the plaintiff.

III. That although sufficient time has elapsed therefor, he has neglected and refused, and still neglects and refuses, to render to the plaintiff a just and true account of such sale, and of the proceeds thereof, and has also neglected and refused to

pay over the proceeds to the plaintiff, to his damage dollars.

WHEREFORE, etc.

904. Against a bank, for neglecting to present a note lodged with it for collection (Bank v. Smedes, 3 Cow. 662).

I. [*For allegation of defendant's incorporation see Forms 539 and 540, ante.*]

II. That the defendants, on or about the day of, 19.., received from the plaintiff, he then being a depositor at their bank, a negotiable promissory note [*or, bill of exchange*] of which the following is a copy [*copy of note*].

III. That the defendants, in consideration thereof, undertook and promised the plaintiff to use due diligence in presenting said note, and demanding payment thereof, from the makers [*or, if it is a bill of exchange: from the acceptors*]; and in case of default in payment thereof, according to its tenor [*to cause the same to be duly protested for non-payment, and*] to cause due notice thereof to be given to M.... N.... the indorser [*or, drawer*] thereof, whereby to render him liable thereon.

IV. That the defendants * did not present said [*note*] for payment on the day of its maturity, but negligently omitted to do so, by reason whereof the plaintiffs have wholly lost the moneys due on said note.

WHEREFORE, etc.

905. The same, for not giving due notice.

[*As in preceding form to the * and continue*]: presented said [*note*] on the day of its maturity, and the same was not paid, but that they did not give due notice thereof to the said [*indorser*], but negligently omitted to do so, by reason whereof the plaintiffs have wholly lost the moneys due on said note.

WHEREFORE, etc.

906. By sheriff against a receiptor.

I. That on the day of, 19.., at, the defendant received from the plaintiff [then the sheriff of the county of] certain goods of the value of dollars, described as follows [*briefly describe the same*] [the property of one M.... N...., a judgment-debtor, upon which this plaintiff had levied an execution delivered to him as such sheriff]; and the defendant thereupon gave to the plaintiff a receipt, of which the following is a copy [*copy receipt*]. [*Or state contents of the receipt.*]

II. That on the day of ... , 19. , at ... , the

plaintiff demanded of the defendant that he deliver said goods or pay said sum of dollars; but he refused and still refuses to do so.

III. That by reason of the premises the plaintiff has suffered damage in the sum of dollars.

WHEREFORE, etc.

907. Against bailee, for not taking care of and returning goods.

I. That on the day of, 19.., at, the plaintiff delivered to the defendant a quantity of merchandise [*or very briefly designate the articles*] of the value of dollars, to be by the defendant safely and securely kept for the plaintiff [for a compensation] and to be returned and redelivered to the plaintiff on request.

II. That the plaintiff duly performed all the conditions thereof on his part; and on or about the day of, 19.., requested the defendant to redeliver the same.

III. That the defendant, not regarding his promise and undertaking, did not take care of and safely keep the said goods for the plaintiff, nor did he, when so requested, or at any time afterwards, redeliver the same to the plaintiff; but on the contrary, the defendant so negligently and carelessly conducted himself with respect to the said goods, and took so little care thereof, that by and through the mere carelessness, negligence and improper conduct of the defendant and his servants, the goods were wholly lost to the plaintiff, to his damage dollars.

WHEREFORE, etc.

908. Against a watchmaker, for not using due care and skill in repairing.

I. That the defendant, being a watchmaker at, the plaintiff, on the day of, 19.., delivered to him a watch of the plaintiff, of the value of dollars, to be repaired by the defendant, for reward.

II. That in consideration of the premises, the defendant then undertook said employment, and to use due care and skill in repairing said watch, and to take care thereof while in his possession, and to redeliver the same to the plaintiff on request.

III. That the defendant did not take due and proper care of the said watch whilst in his possession, whereby the said watch was broken and injured; and he did not use due care or skill in repairing the said watch, but did his work in so careless and unworkmanlike manner that no benefit was derived there-

from, and the watch was broken and injured, to the plaintiff's damage dollars.

WHEREFORE, etc.

909. The same, for not returning the watch.

I and II. [*As in preceding form.*]

III. That after a reasonable time for the repair of said watch, and on or about the day of, 19.., the plaintiff requested the defendant to redeliver the same; but he refused and still refuses so to do, to the plaintiff's damage dollars.

WHEREFORE, etc.

910. For negligence in loading a cargo.

I. That on the day of, 19.., at, the plaintiff, at the request of the defendant, caused to be delivered to him [*very briefly designate the goods*] of the plaintiff, of the value of dollars, to be by the defendant safely and securely loaded on board a certain vessel, at for the plaintiff, for a reasonable compensation to the said defendant in that behalf; and the defendant then received the goods for that purpose.

II. That the defendant, not regarding his duty in that behalf, afterwards, by himself and his servants, conducted so carelessly and improperly in the loading of the said goods on board the said vessel, that by their mere negligence and improper conduct, the goods were broken and injured, to the damage of the plaintiff dollars.

WHEREFORE, etc.

911. For immoderately driving a horse.

I. That on the day of, 19.., at, the defendant hired and received from the plaintiff a horse of the plaintiff, of the value of dollars, to drive.

II. That the defendant drove the horse so immoderately, and so neglected the care of him, that the said horse afterwards, on the day of, 19.., died [*or, that he became lame and hurt, and remained so ever since*], to the damage of the plaintiff dollars.

WHEREFORE, etc.

912. For driving on a different journey from that agreed.

I. That on the day of, 19.., at, the defendant hired and received from the plaintiff a horse [and carriage] of the plaintiff, of the value of dollars, to drive from to and not elsewhere.

II. That the defendant, in violation of the agreement, performed a different journey than that aforesaid, and drove said horse [and carriage] from to

III. That he did not take proper care of said horse [and carriage] but so negligently drove and managed the same that [the carriage was broken] to the plaintiff's damage dollars.

WHEREFORE, etc.

913. Against the hirer of furniture, etc., for not taking care of the same.

I. That on the day of, 19.., at, the defendant hired and received of the plaintiff certain goods [*very briefly designating them*] of the value of dollars, for use during the period of one year then next ensuing, at the sum of dollars.

II. That the defendant, not regarding his duty in that behalf, did not take due and proper care of the said goods, or use the same in a reasonable or proper manner during the said time, but took so little care of the said goods that they became injured and deteriorated in value, to the plaintiff's damage dollars.

WHEREFORE, etc.

CHAPTER LI.

COMPLAINTS AGAINST COMMON CARRIERS, INNKEEPERS, ETC., FOR BREACH OF CONTRACT OR NEGLIGENCE OF DUTY.

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| 914. Against a common carrier on contract for loss of goods. | 923. Against innkeeper for loss of trunk or contents. |
| 915. Against common carrier for breach of duty as carrier. | 924. Against proprietor of bathing-house for loss of pocket-book. |
| 916. Against either common or private carrier for breach of special contract of carriage. | 925. Against innkeeper, for refusal to receive traveler. |
| 917. Against a common carrier for loss of baggage. | 926. Against pledgee for loss of pledge. |
| 918. Against the same, for failure to deliver at agreed time, with claim for special damage. | 927. The same, for injury to pledge. |
| 919. Allegation of through contract over connecting lines. | 928. Against warehouseman for loss of goods. |
| 920. Against carriers by water for not regarding notice to keep dry. | 929. The same, for injury to goods by neglect to obey instructions. |
| 921. Allegation of negligent unloading. | 930. The same, for refusal to deliver. |
| 922. Against carrier for refusing to transport cattle in compliance with previous agreement. | 931. The same, for not forwarding goods according to agreement. |
| | 932. Against a telegraph company for failure to deliver a message according to contract. |

914. Against a common carrier on contract for loss of goods.¹

I. That at the times hereinafter mentioned, the defendant was and still is a corporation duly organized and existing under

¹ Actions against common carriers for failure to transport goods or persons safely may generally be brought either in contract or in tort, and it is sometimes difficult to determine the nature of the action from the pleadings. While in most cases the distinction is immaterial, there may be considerations, such as the application of the statute of limitations, which will make the question one of importance. In general it may be

said that if it is desired to sue in contract the complaint should set forth the contract, the consideration paid or agreed to be paid, and the breach of the contract; but if it be desired to sue in tort it will be sufficient to set forth the defendant's character as a common carrier, the receipt of the plaintiff's goods in that capacity and the failure to carry out its public duty as carrier substantially as in the next following form.

the laws of the state of, and was a common carrier of goods for hire between the places hereinafter mentioned.

II. That on the day of, 19.., at, in consideration of the sum of dollars then paid [*or, agreed to be paid*] to him by the plaintiff [*or, of a reasonable compensation then agreed to be paid to him by the plaintiff*], the defendant agreed to safely carry to and there deliver to O.... P.... or order [*or otherwise, as the case was*] certain goods, the property of the plaintiff, of the value of dollars, consisting of [*here briefly describe the goods*] which the plaintiff then and there delivered to the defendant, who received the same upon the agreement and for the purposes before mentioned.

III. That the defendant did not safely carry and deliver the said goods pursuant to said agreement [although on the day of, 19.., at, the plaintiff, *or*, said consignee, demanded the same of him]; but, on the contrary, the defendant negligently allowed the same to be wholly lost [*or destroyed*], to the plaintiff's damage in the sum of dollars.

WHEREFORE, etc.

915. Against common carrier for breach of duty as carrier.

1. [*As in preceding form.*]

II. That on the day of, 19.., one M.... N.... delivered to the defendant, and the defendant as such carrier received, certain goods, the property of the plaintiff, to-wit [*describe the goods*], of the value of dollars, to be by the defendant safely carried to and there delivered to plaintiff, for a reasonable reward to be paid by therefor.

III. That the defendant did not safely carry and deliver said goods; but on the contrary, negligently allowed the same to be wholly lost [*or destroyed*] to the plaintiff's damage in the sum of dollars.

WHEREFORE, etc.

916. Against either common or private carrier for breach of special contract of carriage.

1. [*If action be against a corporation which is a common carrier allege its incorporation and its character as a common carrier, as in the first form in this chapter.*]

II. That on the day of, 19.., at, the plaintiff delivered to the defendant certain goods, the property of the plaintiff, to-wit, [*describe the goods*] of the value of dollars, and in consideration of the sum of

dollars [*or, of a reasonable compensation*] paid [*or, agreed to be paid*] to him [it] by the plaintiff, the defendant then and there entered into an agreement with the plaintiff in writing, subscribed by the defendant [by his agent duly authorized thereto] of which agreement the following is a copy [*copy of the agreement*].

III. That the defendant did not safely carry and deliver said goods pursuant to its agreement; but so negligently and carelessly conducted in regard to the same, that they were wholly lost to the plaintiff [*or, but that it failed to deliver them to O.... P.... although on the day of, 19.., at he was requested so to do*] to the damage of the plaintiff dollars.

WHEREFORE, etc.

917. Against a common carrier for loss of baggage.

I. [*As in Form 914, inserting instead of the word goods, the words "passengers with their baggage."*]

II. That on the day of, 19.., at, in consideration of the sum of dollars, then and there paid by the plaintiff, the defendant, in its capacity as common carrier, undertook and agreed to transport the plaintiff with his baggage from the said to the city of and then and there, for the purpose of such transportation received the plaintiff into its cars with his said baggage, consisting of [*describe same*] of the value of dollars.

III. That the defendant failed and neglected to transport said trunks [*or other baggage*] safely and failed to deliver the same to the plaintiff at said city of or at any other place, but negligently lost the same with their contents to the damage of the plaintiff in the sum of dollars.

WHEREFORE, etc.

918. Against the same, for failure to deliver at agreed time, with claim for special damage.

I. [*As in form 914.*]

II. That on the day of, 19.., at, the plaintiff delivered to the defendants [one hundred sheep] of the value of dollars, the property of the plaintiff, which the defendants, in consideration of dollars, [*or, of a reasonable compensation to be*] paid them by the plaintiff, agreed safely to carry to the city of New York, and there deliver to the plaintiff, on or before the day of etc. [*if contract was in writing insert or attach a copy*].

III. That the defendants did not fulfill their agreement safely to carry the same, and to deliver them in New York on said day; but, on the contrary, failed to deliver the same in New York until the day of, 19..

IV. That the market value of said [sheep] in the city of New York on the [day agreed] was dollars, but on the [day of actual delivery] was only dollars; and that by reason of the premises the plaintiff was injured, to his damage dollars.

WHEREFORE, etc.

919. Allegation of through contract over connecting lines (sustained in *Railway Co. v. McNulty*, 7 Tex. Civ. App. 32 s.c. 26 S. W. 414).

That defendant was during said time a common carrier of cattle, for hire, being engaged in the business of transporting cattle to and from different points in Texas where its railroad runs, and also by means of connecting lines to points in other states, and especially to the said place of Chicago; that on the said last named day plaintiff delivered to defendant, as a common carrier as aforesaid, at a certain station on its said road, to-wit, ..., and defendant then and there received from plaintiff head of fine fat beef cattle of the value of dollars per head, and defendant thereupon agreed that it would safely, securely and expeditiously, within a reasonable time thereafter, carry and convey from said station at [to a certain other station, to-wit, Cairo, and from thence] to said place of Chicago, and from said last-named place to be safely delivered to G.... & Co., the agents of plaintiff, all for certain reasonable hire and reward to said defendant in that behalf paid by plaintiff.

920. Against carriers by water for not regarding notice to keep dry.

I. That at the times hereinafter mentioned the defendants [*allege co-partnership or corporate character if such be the fact*] were common carriers of goods by water between and and owned and operated certain vessels or steamboats for the purpose.

II. That on the day of, 19.., at, the plaintiff caused to be shipped on board one of said defendant's said vessels, to-wit, the [*give name*] certain [*very briefly designate the goods*] merchandise, the property of the plaintiff, of the value of dollars [then in good order and well conditioned] in consideration whereof, and of the sum of

dollars, then and there paid [*or, agreed to be paid*] by the plaintiff [*or, by one M.... N....*] to the defendant [*or, in consideration of a reasonable compensation by M.... N.... to be paid to the defendant therefor*] the defendant then and there promised to take care of and safely carry the said goods to and there safely to deliver them to, danger of the seas only excepted, and then and there received said goods for that purpose.

III. That the plaintiff then and there caused due notice to be given to the defendant, that it was necessary to the preservation of said goods that they should be kept in a dry condition.

IV. That the defendant failed to take care of, or safely to carry said goods; but, on the contrary, not regarding his said promise, so negligently and carelessly carried the same [and so negligently conducted, and so misbehaved in regard to the same in his said calling as a carrier] that they became wet, and thereby entirely ruined [*or state other injury, in its nature and extent according to the facts*]; which injury was occasioned, not by reason of any danger of the seas, but wholly through the negligence of the defendant and his servants.

V. That by reason of the premises the plaintiff was injured, to his damage dollars.

WHEREFORE, etc.

921. Allegation of negligent unloading.

I and II. [*As in last preceding form.*]

III. That said vessel afterwards safely arrived at and no [*excepted perils*] prevented the safe carriage or delivery of the goods.

IV. That the defendant, not regarding his duty in that behalf, did not deliver the said goods to the plaintiff; and for want of due care in the defendant and his servants in unloading and delivering said goods, they were wholly lost to the plaintiff, to his damage dollars.

WHEREFORE, etc.

922. Against carrier for refusing to transport cattle in compliance with previous agreement (adapted from complaint sustained in *Railway Co. v. Godman*, 104 Ind. 490).

I. That at the times hereinafter mentioned the defendant was and still is a railroad corporation organized under the laws of the state of and owned and operated a line of railroad between and, and held out to the public and caused to be known that it was a common carrier of freight,

stock and cattle from said to said and had suitable and proper appliances for loading and receiving stock and cattle at said station.

II. That on the day of, 19.., the plaintiff entered into an agreement with the defendant by the terms of which said defendant agreed to receive upon its cars at said station of on the 16th day of August, 19.., seventeen head of fat cattle, the property of the plaintiff, of the value of dollars, and to transport said cattle upon its cars to the said city of and deliver the same to the plaintiff at the Union Stock Yards in said city of at 8 o'clock a. m. on the 17th day of August, 19.., all of which agreements were made by the defendant in consideration of the promise of the plaintiff then and there made to pay to the said defendant upon the delivery of said cattle in the sum of dollars for the carriage and delivery thereof.

III. That relying upon the said representations and promises of the defendant, the plaintiff on the day of, 19.., delivered the said cattle at the stock yards of defendant at said station of in full time to ship the same upon said day, but that the defendant then and there refused to receive said cattle or to transport the same to said city of

IV. That by reason of said refusal on the part of said defendant to receive said cattle upon its cars at the said station of the plaintiff was compelled to drive said cattle to the station of being another station upon the line of said defendant railway, at an expense of dollars, and that said cattle could not be shipped at said last named station on the 16th day of August aforesaid, because of the time necessarily spent in driving the same to said station, but were received by defendant on the 17th day of August, 19.., and were transported by defendant to said city of, where they arrived and were delivered to plaintiff on the 18th day of August, 19.., instead of on the morning of the 17th day of August, 19..

V. That the object and purpose of the plaintiff in shipping said cattle to the said city of was to make sale thereof upon the market, which object and purpose were well known to the defendant when it made the contract with the plaintiff hereinbefore set forth, and that the market price of cattle upon the market at said city of was dollars per hundred-weight upon the 17th day of August, 19.., and was only dollars per hundred-weight upon the 18th day of August, 19.., whereby the plaintiff was obliged to and did sell said cattle for said decreased price, and was thus damaged by

the said refusal of defendant to receive said cattle at and the consequent delay in the delivery thereof at in the further sum of dollars.

WHEREFORE, etc.

923. Against innkeeper for loss of trunk or contents.

I. That at the times hereinafter mentioned, the defendant was the keeper of a common inn or hotel in the city of, known as "The House."

II. That on the day of, 19.., this plaintiff [*or*, one M.... N.... the infant son, *or* the servant of this plaintiff] was received by the defendant into his said inn as a traveler, together with his baggage, to-wit, a trunk containing [*here designate contents lost*], the property of the plaintiff.

III. That the defendant and his servants so negligently and carelessly conducted themselves in regard to the same, that while he so remained at said inn, his said trunk was taken away [*or*, was broken open, and said was taken away] from the room of the said [*guest*] by some person or persons to the plaintiff unknown; and thereby became wholly lost to the plaintiff.

IV. That the value of the said trunk and goods [*or* goods] so as aforesaid lost by the plaintiff, was and is the sum of dollars, and that by reason of the premises the plaintiff has suffered damage in the sum of dollars.

WHEREFORE, etc.

924. Against proprietor of bathing-house for loss of pocket-book.

I. That the defendant, at the time hereinafter stated, was a common innkeeper at the town of in this state.

II. That on the day of, 19.., he received and entertained this plaintiff as a guest at his inn, for hire.

III. That the inn of the defendant was upon the seashore, and in connection with it the defendant maintained bathing-houses for the safe-keeping of the clothing, wardrobe, and such money and jewelry of his guests as are usually carried upon the person of guests and patrons of his inn and bathing-house.

IV. That while the plaintiff was then and there his guest, the defendant undertook, for compensation paid him by the plaintiff, to keep safely in one of his said bathing-houses, the clothing and such articles of jewelry and valuables as the plaintiff then had upon his person, while the plaintiff should bathe; and that the plaintiff thereupon put into his said bathing-house his pocket-book containing money and such other property as is usually carried upon the person, of the value of dol-

lars, and left the same in the possession and charge of the defendant, both as innkeeper and as special bailee as aforesaid.

V. That while the plaintiff was bathing, his pocket-book and money were, by the negligence, carelessness, and dishonest management of the defendant and his servants, lost and stolen.

[VI. That the amount of the said money belonging to the plaintiff so lost and stolen, while the same was under the charge of the defendant was dollars and upwards, in lawful money of the United States, and sundry small silver coins of trifling value; and that the plaintiff is by profession [*designating a business requiring the plaintiff to carry considerable money*] and that said sum was such an amount as he might reasonably and properly carry with him with reference to his circumstances in life, and the nature of his business.]

VII. That the said inn was upon the seashore, and that facilities for bathing according to the custom of the neighborhood, and as the defendant then well knew, were considered a part of the accommodations necessary to be afforded by the innkeepers in that vicinity.

VIII. That by said negligent, careless, and dishonest dealing of the defendant and his servants, the plaintiff has sustained damage in the sum of dollars.

WHEREFORE, etc.

925. Against innkeeper, for refusal to receive traveler.

I. [*As in Form 924.*]

II. That on the day of, 19.., the plaintiff applied to said defendant at his said inn for lodging and entertainment as a traveler, and then and there was ready and willing and offered to pay the said defendant his reasonable charges for such lodging and entertainment.

III. That the defendant, wholly disregarding his duty as innkeeper, refused to receive the plaintiff and refused to furnish him lodging or entertainment at his said hotel, although he had ample accommodation therefor.

IV. That by reason of such refusal the plaintiff was obliged to and did procure a conveyance at an expense of dollars, to carry and which did carry the plaintiff to another hotel at a distance of miles to procure lodging and entertainment [*or allege other facts showing damage*] to plaintiff's damage dollars.

WHEREFORE, etc.

926. Against pledgee for loss of pledge.

I. That on the day of, 19.., at, the plaintiff delivered to the defendant [*briefly designate the thing*]

the property of this plaintiff, of the value of dollars, by way of pledge to the defendant to secure the sum of dollars theretofore loaned by the defendant to the plaintiff [and interest thereon; *or other indebtedness*] which [*pledge*] the defendant received for that purpose, and agreed with the plaintiff to take good care of until it should be redeemed by the plaintiff.

II. That the defendant has failed to fulfill said agreement on his part, and on the contrary took so little care of, and so negligently kept said [*pledge*] that while it was in his possession for the purpose aforesaid, it was through his negligence lost, to the damage of the plaintiff dollars.

WHEREFORE, etc.

927. The same, for injury to pledge.

I. [*As in preceding form.*]

II. That the defendant, not regarding his promise, so negligently conducted in respect to said [*pledge*] and so carelessly used the same, that it became, by reason of his negligence and carelessness, greatly damaged [*state briefly the injury, in its nature and extent, as the case was*], to the damage of the plaintiff dollars.

WHEREFORE, etc.

928. Against warehouseman for loss of goods.

I. That on the day of, 19.., the defendant was a warehouseman engaged in the business of storing goods for hire at the city of, in said county [*if the defendant is a corporation, or if a copartnership is sued, allege corporate or copartnership character as in forms given in Chapter XIX*].

II. That on the day of, 19.., at, the defendant, in consideration of the sum of dollars, then and there paid [*or, agreed to be paid; or, of a reasonable compensation agreed to be paid*] by the plaintiff, agreed to store and safely keep in his warehouse at certain merchandise, the property of the plaintiff, of the value of dollars, consisting of [*here briefly describe the goods*] until the same should be called for by the plaintiff [*or, for the term of two months from said date, or otherwise*], and then safely to deliver said goods to the plaintiff [*or his order*] at his request, and then and there received the same for that purpose.

III. That the defendant neglected to take proper care of said merchandise; and through the defendant's negligence the same became wholly lost to the plaintiff, to his damage dollars.

WHEREFORE, etc.

929. The same, for injury to goods by neglect to obey instructions.

[*I and II as in preceding form.*]

III. That at the time of the delivery of said goods to the defendant the plaintiff caused the defendant to be informed that it was necessary to the preservation of said goods that they should be kept in a dry condition [*or, be handled with care*].

IV. That the defendant negligently allowed the same to become wet [*or, to be handled without care, and roughly moved and broken*], so that the same, through the negligence of the defendant and his servants, became greatly injured [*or, entirely ruined*], to the damage of the plaintiff dollars.

WHEREFORE, etc.

930. The same, for refusal to deliver.

[*I and II as in preceding form.*]

III. That on the day of, 19.., at, the plaintiff requested the defendant to deliver the said goods, and tendered him dollars [*or, the amount due thereon for storage*], but the defendant refused and has ever since refused to deliver the same; to the damage of the plaintiff dollars.

WHEREFORE, etc.

931. The same, for not forwarding goods according to agreement.

I. That at the time hereinafter mentioned, the defendant was a forwarding agent and keeper of a warehouse at for the reception of goods intended to be forwarded by him for hire, from to

II. That on the day of, 19.., the defendant received from the plaintiff certain merchandise, to-wit [*briefly describing it*] the property of the plaintiff, of the value of dollars, which he undertook for hire to forward in a reasonable time from to by [a vessel], and meanwhile to store and safely keep the same.

III. That after the defendant received said goods such a [vessel] did, within a reasonable time then following, proceed from said to, and the defendant might and ought to have delivered the said goods to the [master of such vessel] for the purpose aforesaid.

IV. That the defendant did not do so, or otherwise forward said goods within a reasonable time, but kept and detained the same in his said warehouse, for a long and unreasonable time,

to-wit, two months, whereby the said goods perished; to the damage of the plaintiff dollars.

[If special damage is sought to be recovered the facts should be set forth.]

WHEREFORE, etc.

932. Against a telegraph company for failure to deliver a message according to contract.²

I. That at the times hereinafter mentioned, the defendant was and now is a foreign corporation organized and existing under the laws of the state of owning and operating a public line of telegraph between and and held itself out to the public to be and in fact was a common carrier of telegraphic messages for hire between the said places above-named.

II. That on the day of, 19.., the plaintiff wrote and delivered to the said defendant at its office at a telegraphic message addressed to one M.... N.... at

² While telegraph companies are not strictly common carriers at common law, they are frequently so called and their obligations to the public are analogous to those of common carriers in that they exercise a public employment and must forward all messages presented to them without discrimination upon which the regulated fee is tendered or paid. They cannot contract to be relieved against responsibility for their own negligence, though they may make reasonable rules regulating their responsibility. *Candee v. W. U. Tel. Co.*, 34 Wis. 471; *Thompson v. Same*, 64 Wis. 531.

In the absence of statute, they are liable only for such damages for negligence as arise naturally from the failure to transmit, or may reasonably be supposed to have been in contemplation of the parties as the probable result of a breach. *Candee v. W. U. Tel. Co.*, *supra*. Hence, where the message is in cipher, or does not on its face show its import to the agent receiving it, it must be alleged and proven that the receiving agent knew or was notified of the facts showing the purpose of the mes-

sage and the probable result of a failure to transmit it. The liability is statutory in Wisconsin (*Wis. Stats.* 1898 sec. 1778 as amended by Laws of 1901 c. 319 and Laws of 1905 cc. 304 and 505), Minnesota (*Minn. Rev. Laws* 1905 sec. 2931), Iowa (*Iowa Code* sec. 2163), North Dakota (*N. Dak. Rev. Codes* sec. 4253), South Dakota (*S. Dak. Rev. Civ. C.* sec. 564), Nebraska (*Cobbey's Ann. Stats.* of Nebr. sec. 11460-11461).

In North and South Dakota telegraph companies are called "common carriers" by statute, and are bound to the utmost diligence in transmission. *N. D. Rev. Codes* sec. 4223-4251; *S. Dak. Rev. Civ. C.* sec. 1576.

Damages for mere mental anguish are not recoverable. *Summerfield v. W. U. Tel. Co.*, 87 Wis. 1; *Francis v. W. U. Tel. Co.* (*Minn.*) 59 N. W. 1078; *Russell v. W. U. Tel. Co.*, 3 Dak. 315.

The form here given has not been taken from any precedent but it is believed to outline correctly the facts necessary to be alleged, which in every case will be subject to variation.

which message was in words and figures as follows [*insert copy of message*] and then and there paid to the defendant the sum of cents, which was the fee demanded by the said defendant for the transmission of said message, and the said defendant then and there agreed with the plaintiff in consideration of the fee so paid to forward said message at once and deliver the same to said M.... N....

III. That the defendant carelessly and negligently failed and neglected to forward or deliver said message for the space of days, so that the same was not delivered to or received by said M.... N.... until the day of, 19.., whereas the same in the ordinary course of prompt transmission and delivery should have been delivered on the said day of, 19..

IV. [*Allege facts showing damage, e. g.*]: That the plaintiff was at the time of the delivery of said message to the defendant a dealer in grain and was possessed of thousand bushels of wheat, and that his object and purpose in the sending of said telegram to said M.... N.... was to authorize and empower said M.... N.... to sell for the plaintiff at the market price the said thousand bushels of wheat, which price on said day of, 19.., was cents per bushel, all of which facts were well known to the defendant, and that had said telegram been forwarded and delivered by defendant with reasonable promptness the said M.... N.... would have sold said wheat for said price; but that on account of the defendant's said failure to forward and deliver said message the said M.... N.... did not sell said wheat until the day of, 19.., at which time the market price thereof had fallen to cents per bushel, and the plaintiff thereby was damaged in the sum of dollars.

WHEREFORE, etc.

CHAPTER LII.

COMPLAINTS IN ACTIONS AGAINST SHERIFFS.

- | | |
|--|---|
| 933. For neglecting to return execution. | 937. For seizing exempt property. |
| 934. For neglecting to levy. | 938. For a false return. |
| 935. For failure to arrest on execution against the body. | 939. For an escape, common form. |
| 936. For neglecting to pay over moneys collected on execution. | 940. For escape from custody upon an order of arrest. |
| | 941. Upon sheriff's liability as bail. |

The forms in this chapter are designed to be used in actions against the sheriff alone for breach of official duty resulting in damage. They are not suitable for actions upon the sheriff's bond, forms for that purpose being given in Chapter XXXI. Where the sheriff has wrongfully levied on property or made an unlawful arrest an ordinary complaint for trespass to property or person will be sufficient without mention of his official character.

933. For neglecting to return execution.

I. That at the time of the issuing of the execution hereinafter mentioned, the defendant was the sheriff of the county of in this state.

II. That on the day of, 19.., in an action in the court for the county of state of [*or other court, or, before K.... L...., a justice of the peace in and for the town of in the county of in this state*], wherein this plaintiff was plaintiff and one M.... N.... was defendant [*or otherwise*] the plaintiff recovered a judgment duly given by said court, against the said M.... N.... for dollars [*or, where the judgment was in a justice's court, duly given by said justice against said M.... N.... for dollars, which judgment was thereafter duly docketed in the office of the clerk of the court of county*]. [*Or otherwise, as required by statute.*]

III. That on the day of, 19.., an execution against the property of said M.... N.... was duly issued by this plaintiff on said judgment, and directed and then delivered to the defendant, as sheriff of the county of of which execution the following is a copy [*copy of the execution and*

indorsement], [*or state its substance, e. g., thus:* whereby said defendant was directed to satisfy said judgment out of the personal property of said M.... N..., in said county, or if sufficient personal property could not be found, out of the real property belonging to him on the day when said judgment was docketed in said county, or at any time thereafter, and return said execution to within sixty days after the receipt thereof by him].

IV. That although [more than] sixty days elapsed after delivery of said execution to the defendant, and before the commencement of this action, yet he has, in violation of his duty as such sheriff, failed to return the same, to the damage of the plaintiff dollars.

WHEREFORE, etc.

934. For neglecting to levy.

I, II and III. [*As in preceding form.*]

IV. That although at the time of the said delivery of the execution to the defendant, there was within said county personal property [*or, real estate*] belonging to the defendant, to-wit [*designate it briefly*] out of which the defendant might have satisfied the execution, of which property he then and there had notice; nevertheless, in violation of his duty as such sheriff he failed to levy the moneys or any part thereof, as by said execution he was required to do, to the damage of the plaintiff dollars.

WHEREFORE, etc.

935. For failure to arrest on execution against the body.

I, II and III. [*As in preceding form, except that it should be alleged that the execution ran against the person.*]

IV. That on the day of, 19.., and while said execution was still in the hands of said sheriff, the said M.... N.... was within the said county to the knowledge of the said defendant sheriff and within his view, but that the said sheriff, in violation of his duty and the command of said execution, wilfully neglected to arrest the said M.... N.... and falsely made return upon said execution that said M.... N.... was not found within said county, to plaintiff's damage dollars.

WHEREFORE, etc.

936. For neglecting to pay over moneys collected on execution.

I. That at the times hereinafter mentioned, the defendant was the sheriff of the county of in this state.

II. That on the day of, 19.., an execution, then duly issued, in form and effect as required by law, against the property [*or, the person*] of one M.... N.... and in favor of the plaintiff, upon a judgment for the sum of dollars theretofore duly given in favor of the plaintiff against said M.... N.... in the court of county was by the plaintiff directed and delivered to the defendant as such sheriff.

III. That the defendant thereafter, as such sheriff, collected and received upon said execution, to the use of the plaintiff, the sum of dollars, besides his lawful fees and poundage.

IV. That although [more than] sixty days elapsed, after the delivery of said execution to the defendant, before this action, yet he has, in violation of his duty as such sheriff, failed to pay over to the plaintiff the amount so collected, or to pay the same into court, to the damage of the plaintiff in the sum of dollars.

WHEREFORE, etc.

937. For seizing exempt property.

[*See forms for conversion and for injuries to personal property given in Chapters XLVII and XLVIII.*]

938. For a false return (Bacon v. Cropsey, 7 N. Y. 195).

I. That at the time of the issuing and return of the execution hereinafter mentioned, the defendant was the sheriff of the county of in this state.

II. That on the day of, 19.., this plaintiff recovered a judgment duly given by the court in and for the county of [*or other court*] against one M.... N.... for dollars. [*Or as in first form in this Chapter.*]

III. That on the day of, 19.., an execution against the property of said M.... N.... [*or, if the judgment was against several joint debtors on service of part only, say: against the joint property of M.... N.... and O.... P.... and against the separate property of O.... P....*] was duly issued upon said judgment by the plaintiff, and directed and then delivered to the defendant as such sheriff, of which execution, and the indorsement thereon, the following is a copy [*or, whereby the defendant was required, etc., stating effect as in first form in this chapter*].

IV. That the defendant as such sheriff, did, within sixty days thereafter, by virtue of said execution, levy on certain personal property of said M.... N.... within said county, of the value sufficient to satisfy said judgment [*or, said judgment in*

part, to-wit, to the amount of dollars] together with the defendants' fees and poundage.

V. That notwithstanding the premises, and in violation of his duty as sheriff, he did not satisfy said judgment or any part thereof; but has falsely returned upon said execution to the clerk of the county of that said M.... N.... had not any goods or chattels within said county, whereby he could cause to be levied the amount of said judgment, or any part thereof, to the damage of the plaintiff dollars.

WHEREFORE, etc

939. For an escape, common form.

I. That at the time of the issuing of the execution and of the escape hereinafter mentioned, the defendant was the sheriff of the county of in this state.

II. That on the day of, 19.., in an action brought in the Supreme Court of this state, in the county of [or other court] by this plaintiff against one M.... N.... [or, by one M.... N.... against this plaintiff] for wrongfully converting property [or state other cause authorizing arrest] this plaintiff recovered judgment, duly given by said court, against said M.... N.... for dollars.

III. That on the day of, 19.., an execution against the property of said M.... N.... was duly issued by this plaintiff on said judgment, and thereafter duly returned wholly unsatisfied [if partly satisfied, add: except as to the sum of dollars].

IV. That thereafter and on the day of, 19.., an execution against the person of the said M.... N.... was duly issued by this plaintiff on said judgment, and then directed and delivered to the defendant as said sheriff, whereby he was required to arrest said M.... N.... and to commit him to the jail of said county of until he should pay said judgment, or be discharged according to law.

V. That thereafter the defendant, as such sheriff, arrested said M.... N.... and committed him to jail, pursuant to said execution; but in violation of his duty as such sheriff, has since, to-wit, on the day of, 19.., without the consent of the plaintiff, permitted said M.... N.... to escape [or, but since then, to-wit, on the day of, 19.., said M.... N.... went and was at large without the limits of the liberties of said jail, without the assent of the plaintiff] to the damage of the plaintiff dollars.

WHEREFORE, etc.

940. For escape from custody upon an order of arrest.

I. [*As in preceding form.*]

II. That on the day of, 19.., in an action brought in the court of this state, in the county of [*or other court*] by this plaintiff against one M.... N.... for wrongfully converting property [*or other case authorizing arrest*] an order was duly made by Hon. J.... K.... judge of said court, whereby the defendant, as such sheriff, was required to arrest the said M.... N.... and hold him to bail in the sum of dollars.

III. That thereafter and on the day of, 19.., said order was duly delivered to the defendant, as said sheriff, to be executed.

IV. That thereafter the defendant, as such sheriff, arrested said M.... N.... and committed him to jail, pursuant to said order; but in violation of his duty as such officer, has since, to-wit, on the day of, 19.., without the consent of this plaintiff, permitted said M.... N.... to escape [*or, but since then, to-wit, on the day of 19.., said M.... N.... went and was at large without the limits of the liberties of said jail, without the assent of the plaintiff*] to the damage of the plaintiff dollars.

WHEREFORE, etc.

941. Upon sheriff's liability as bail (Metcalf v. Stryker, 31 N. Y. 255, affirming 31 Barb. 62, 10 Abb. Pr. 13).¹

I. That at the times hereinafter named, the plaintiffs were co-partners, doing business in the city of New York, under the firm name of M.... & D....

II. That the defendant was sheriff of the county of on and from the day of, 19.., to the day of, 19..

III. That an order of arrest, of which a copy is annexed as part of this complaint, marked Schedule B, was duly made by J.... K.... at that time a judge of the court of this state, and delivered to the said defendant, on or about the day of, 19.., in an action in said court, wherein these

¹ This form is adapted for use under the provisions of the statutes of Wisconsin, North Dakota and South Dakota (Wis. Stats. 1898 sec. 2712; N. Dak. Rev. Codes sec. 5326; S. Dak. Rev. Codes C. P. sec 179), all of which provide that in case of civil arrest the sheriff

shall be liable *as bail* for an escape in case the required bail has not been given. There are no provisions for civil arrest in Minnesota, Iowa and Nebraska, hence this form is not applicable to the last named states.

plaintiffs were plaintiffs, and one G.... H.... was defendant, requiring the defendant in this action to arrest and hold to bail, in the sum of dollars, the said G.... H....

IV. That thereupon the defendant arrested said G.... H.... on or about the day of, 19.. [*in North Dakota and South Dakota insert, that there was at that date a jail within the county of to which said G.... H.... could have been committed*] and thereafter said sheriff permitted him to escape from his custody; and on or about the day of, 19.., the said defendant delivered to the plaintiff's attorneys, by whom the order of arrest was subscribed or indorsed, a paper purporting to be a certified copy of an undertaking of the bail taken by him upon the discharge of the said G.... H.... from arrest, a copy of which is annexed as a part of this complaint, and marked Schedule A; but the same was not executed by two or more sufficient bail, and did not state their places of residence and occupations, according to law; and that on the next day, that is to say, on or about the day of, 19.., a notice was duly served on the defendant, that the plaintiffs did not accept the said bail, but after the receipt of the said notice by the defendant, neither the defendant nor the said G.... H.... gave to the plaintiffs or their attorneys, by whom the said order of arrest was subscribed, notice of the justification of the same, or of other bail, before a judge of the court, at any specified time or place, nor any justification, or other notice of justification, as required by law.

V. That on the day of, 19.., the plaintiffs obtained judgment in said action against said G.... H.... for dollars, and on the day of, 19.., caused [to be filed a transcript of said judgment in the office of the clerk of the court, and] an execution to be duly issued to the then sheriff of said county, upon said judgment, against the property of said G.... H.... which was thereafter returned by said sheriff, wholly unsatisfied; and, thereafter, and on the day of, 19.., an execution against the person of said G.... H.... was duly issued to the said sheriff, which has also been returned by the said sheriff "defendant not found."

VI. That the said judgment has not been paid, nor any part thereof; but the same is still unpaid, and in full force.

VII. That the amount of said judgment and interest was duly demanded of said defendant, before the commencement of this action, and the payment of the same refused.

VIII. That by reason of the premises the plaintiff has suffered damage in the sum of dollars.

WHEREFORE, etc.

CHAPTER LIII.

COMPLAINTS FOR ASSAULT AND BATTERY.

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|---|---|
| 942. For assault and battery, short form. | 945. For the same, another form. |
| 943. For the same, alleging particulars and claiming special damages. | 946. For the same, another form. |
| 944. For assault and battery with accompanying false imprisonment. | 947. For assault on servant or child. |
| | 948. For forcible ejection from a street car. |
| | 949. Complaint for forcible ejection from a railroad train. |

942. For assault and battery, short form.

That on the day of, 19.., at, the defendant unlawfully and maliciously assaulted and beat the plaintiff, to his damage dollars.

WHEREFORE, etc.

943. For the same, alleging particulars and claiming special damages.

That on the day of, 19.., at, the defendant violently and maliciously assaulted the plaintiff, and struck him in the face and breast several violent blows, and aimed at him a gun and threatened to shoot him, whereby he put the plaintiff in fear for his life; and maliciously caused a dog to bite the plaintiff; and also tore the clothes from plaintiff's person [*or otherwise describe the violence used, and its consequences; special damage, if any, being stated, thus:* and the plaintiff was thereby made ill and lame, and disabled from attending to his business for thereafter, and was compelled to pay dollars for medical attendance, and has been ever since, and for a long time will be lame], to his damage dollars.

WHEREFORE, etc.

944. For assault and battery with accompanying false imprisonment.

That on the day of, 19.., at, the defendant assaulted and beat the plaintiff, and falsely and maliciously imprisoned him, without reasonable cause and without right

[and detained him for hours, preventing him from attending to his business] to his damage dollars.

WHEREFORE, etc.

945. For the same, another form.

That the defendant, on the day of, 19.., at, unlawfully and maliciously made an assault upon the plaintiff, seized hold of him and violently forced the plaintiff along the public streets to the common jail of said county, and then and there imprisoned and detained the plaintiff in said jail for days, without any reasonable or probable cause whatever, contrary to law and against the will of the plaintiff, to the plaintiff's damage dollars.

WHEREFORE, etc.

946. For the same, another form (sustained in *Sheldon v. Lake*, 9 Abb. Pr. (N. Y.) 306).[†]

I. That on or about the day of, 19.., at, the defendant with force and arms assaulted the plaintiff, and with great force and violence pulled and dragged about the said plaintiff, and also then and there forced and compelled the said plaintiff to go from a certain place in said city into the public streets thereof, and then and there forced and compelled him to go in and along divers public streets in said city, and then and there imprisoned the said plaintiff, and put him in the custody of the sheriff of the county of and detained him for the period of several days in said custody, and restrained and deprived the said plaintiff of his liberty without any reasonable or probable cause whatsoever.

II. That all of the malicious acts aforesaid were against the will of the said plaintiff, whereby the said plaintiff was not only greatly hurt, bruised and wounded, but was also thereby then and there greatly exposed and injured in his credit and circumstances, and was then and there hindered and prevented from performing and transacting his affairs and business, by means whereof said plaintiff says he has sustained damages to the amount of dollars.

WHEREFORE, etc.

947. For assault on servant or child.

That on the day of, 19.., defendant made an assault upon A.... B.... the servant [son, daughter, *or* wife] of the plaintiff, and so beat, wounded and ill-treated him [*or*, her] that he [*or* she] was rendered sick and unable to perform labor, and so remained for months, during all of which

time the plaintiff was deprived of the services of the said A.... B.... and was obliged to expend dollars for medical attendance and nursing for said A.... B.... to the damage of plaintiff in the sum of dollars.

WHEREFORE, etc.

948. For forcible ejection from a street car (adapted from complaint in *Vassau v. Street Ry. Co.*, 106 Wis. 301).

I. That the defendant is now and was at the times herein-after named a street railway corporation organized and existing under the laws of the state of Wisconsin and owned and operated a line of street railway upon certain streets in the city of Madison, whereon it carried passengers for hire as a common carrier.

II. That on the day of, 19.., the defendant received the plaintiff into one of its street cars as a passenger, and the plaintiff paid to the conductor in charge of said car the full and regular fare and in all respects complied with the rules and regulations of the defendant relative to the receiving and transporting of passengers over its said line of railway.

III. That after plaintiff had ridden a distance of five or six blocks upon said car, and had so paid his fare, the said conductor in loud and insulting language and in presence of other passengers falsely charged that the plaintiff had given and passed to him the said conductor in payment of his fare a piece of counterfeit money and demanded that the plaintiff pay his fare or leave said car.

IV. That the charge so made by said conductor was false and that the plaintiff refused to pay his fare a second time and refused to leave said car until he had reached his destination, and that thereupon the said conductor stopped the said car and again charged the plaintiff in an insulting manner with passing counterfeit money and ordered the plaintiff to leave the car, and upon plaintiff's refusal so to do forcibly and violently and in the presence of a large number of passengers ejected the plaintiff from said car before reaching his destination, and would not permit him to ride further.

V. That by reason of the premises the plaintiff was greatly injured in his person [*allege physical injuries, if any*] and suffered great mortification and injury to his feelings by reason of the public insult so inflicted upon him, to his damage in the sum of dollars.

VI. [*Allege special damage suffered, if any.*]

WHEREFORE, etc.

**949. Complaint for forcible ejection from a railroad train
(adapted from Washburn v. Railroad Co., 84 Wis.
251).**

I. That the above named defendant is and was at the times hereinafter mentioned a railway corporation duly created, organized and existing under and by virtue of the laws of the state of Wisconsin, and owned and operated a railroad in the said state of Wisconsin extending from the city of to the city of in said state, and was and is a common carrier of passengers between the said cities.

II. That on or about the day of, 19.., this plaintiff purchased a ticket of passage on the defendant's said railway entitling the plaintiff to be carried upon a passenger train of the defendant from the city of to the city of and thereupon entered one of the passenger cars of the defendant at said city of upon the regular passenger train of the defendant leaving the said city of at o'clock on the said day of, 19..

III. That after the defendant had carried the plaintiff as such passenger a distance of a few miles in its said car and train toward the city of the said defendant by its agents, servants and employees, wrongfully and unlawfully and with force and violence and while said train was moving rapidly and at a place other than a usual stopping place and not near any dwelling house, ejected and turned this plaintiff out of and from said car and train, and wrongfully declined and refused to carry or further transport the plaintiff on its said road.

IV. That in removing and ejecting the plaintiff from said car and train as aforesaid, the agents and employees of the defendant violently assaulted and wounded the plaintiff so that he became and was unconscious for some time after he was ejected from said train, and that in consequence of such assault and ejection the plaintiff was rendered sore, lame and bruised for a long time, suffered great pain and anguish in mind and body and, as plaintiff is informed and believes, is permanently injured and disabled in consequence thereof.

V. That by reason of the premises and of the aforesaid wrongful acts of the defendant and its agents and employees, plaintiff has been damaged in the sum of dollars.

WHEREFORE, etc.

CHAPTER LIV.

COMPLAINTS IN ACTIONS FOR MALICIOUS PROSECUTION.

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| <p>950. For malicious prosecution on a criminal charge, where plaintiff was discharged on the preliminary examination.</p> <p>951. The same; where plaintiff was tried and acquitted.</p> <p>952. For malicious arrest in a civil action.</p> | <p>953. For malicious arrest in civil action; another form.</p> <p>954. For maliciously suing out a warrant of attachment.</p> <p>955. For maliciously obtaining the appointment of a receiver in an action for closing up a partnership.</p> |
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In an action of malicious prosecution there are three essentials: (1) that a prosecution was commenced by the defendant or at his instigation maliciously and without probable cause; (2) that such prosecution has finally terminated in plaintiff's favor; and (3) that the plaintiff has suffered legal damage by reason of such prosecution. The prosecution may have been either a civil or criminal one, but if it be a civil prosecution this action cannot be maintained unless either the person or the property of the defendant be interfered with, thus inflicting special damage. *Luby v. Bennett*, 111 Wis. 613; *Wetmore v. Mellinger*, 64 Iowa, 741 s.c. 18 N. W. 870.

950. For malicious prosecution on a criminal charge, where plaintiff was discharged on the preliminary examination.

I. That on the day of, 19.., at, the defendant, maliciously intending to injure the plaintiff in his good name and credit, appeared before E.... F...., justice of the peace of said county, and maliciously, without any probable cause whatsoever, made complaint on oath before said justice, charging the plaintiff with having [*briefly state offense charged*]; and maliciously and without probable cause procured said justice to issue a warrant for the arrest of the plaintiff upon the said false charge.

II. That the said justice on said day issued said warrant accordingly, and the plaintiff was arrested and imprisoned under the same for hours and was obliged to, and actually

did, give bail in the sum of dollars in order to obtain his release.

III. That afterwards, and on the day of, 19.., the plaintiff was examined before the said justice on the said charge, and upon such examination it was found and adjudged by said justice that there was no probable cause to believe the plaintiff guilty of said crime, or of any crime whatever, and thereupon the plaintiff was discharged by said justice, since which time the defendant has not further prosecuted said complaint, but has abandoned the same.

[IV. That the said charge, and the arrest of the plaintiff thereunder were extensively published in several public newspapers, among others the Q.... Z.... as the plaintiff believes, through the procurement of the defendant.]

V. That by means of the premises the plaintiff was injured in his person, and prevented from attending to his business, and was compelled to pay dollars costs, counsel fees in defending himself, and dollars in obtaining bail; and in consequence of the arrest and detention he lost his situation as servant of O.... P....; and many persons, hearing of the said arrest, and supposing the plaintiff to be a criminal, have refused to employ him, to his damage in the sum of dollars.¹

WHEREFORE, etc.

951. The same, where plaintiff was tried and acquitted.

[Proceed as in preceding form and insert in place of allegation III, the following]:

III. That thereafter, and on the day of, 19.., the plaintiff was tried upon the said charge, by the court and a jury, and was then and there acquitted and discharged, whereby said prosecution was wholly and finally terminated.

952. For malicious arrest in a civil action.

I. That on the day of, 19.., at, the defendant, maliciously intending to injure the plaintiff, and without probable cause, made affidavit in an action then brought [or depending] against this plaintiff by L.... M.... in which he falsely and maliciously alleged [*here set forth the grounds of the false arrest*]; and that upon said affidavit the defendant procured to be issued an order of arrest against this plaintiff,

¹ Under very familiar rules special damages, such as loss of employment or trade, or expenses of defense, can not be recovered un-

less specially alleged; whereas, damages naturally resulting may be recovered under the general averment of damage.

under which the plaintiff was arrested and imprisoned for the space of and compelled to give bail in the sum of dollars.

II. That thereafter, and prior to the commencement of this action, said order of arrest was vacated by said court [*or judge*], upon the ground that [*here set forth briefly the grounds on which it was vacated*].

[*Or:* II. That thereafter, and prior to the commencement of this action, such proceedings were had in such action, that it was finally determined in favor of this plaintiff, and judgment was rendered for him therein.]

III. [*Allege damage as in the first form in this chapter.*]

WHEREFORE, etc.

953. For malicious arrest in civil action; another form.

I. That on the day of, 19.., at, the defendant maliciously, and without probable cause, commenced an action against the plaintiff in the court, upon a complaint duly filed therein, in which he falsely alleged that the plaintiff had theretofore and on the day of, 19.. [*here set forth briefly the grounds of the said action*].

II. That on said day of, 19.., the defendant, maliciously made in said action a false affidavit, in which he falsely and maliciously averred that this plaintiff did, on said day of, 19.. [*here set forth briefly the facts alleged in the affidavit as grounds of arrest*], and thereupon presented the same to the honorable J.... K...., the circuit judge of said court, and demanded thereon an order for the arrest of this plaintiff.

III. That by said affidavit it was falsely made to appear that a sufficient cause of action existed for an order for the arrest of this plaintiff therein; and, thereupon the said judge issued an order for the arrest of this plaintiff in said action, and holding him to bail in the sum of dollars, which order the defendant delivered to the sheriff of said county.

IV. That thereupon the sheriff of said county, on the day of, 19.., arrested the plaintiff by virtue of said order, and imprisoned him for the space of days, and compelled him to give bail in the sum of dollars.

V. That thereafter, and prior to the commencement of this action, on motion of this plaintiff, the said order of arrest was vacated on the ground that the same had been issued improperly, and without a sufficient cause existing therefor.

[*Or:* That such proceedings were thereafter had in said action, that on the day of, 19.., it was duly adjudged

that the defendant had no cause of action, and that the plaintiff recover his costs in said action.]

VI. That by means of the premises the plaintiff was injured in his name and credit, prevented from pursuing his business, compelled to pay counsel fees in defending himself, to obtain bail, and was injured in his business, lost custom, trade and employment, in all to his damage dollars.

WHEREFORE, etc.

954. For maliciously suing out a warrant of attachment.

I. That on the day of, 19.., the defendant, maliciously intending to injure the plaintiff, falsely and without probable cause, made and verified an affidavit for attachment against the property of the plaintiff, in a certain action then brought by said defendant against the plaintiff in the court to recover the sum of dollars.

II. That thereupon said defendant maliciously and without probable cause, caused a writ [*or warrant*] of attachment to be issued out of said court and levied upon plaintiff's property, to-wit [*describe the property levied upon*], which said property was thereupon taken into the possession of the [sheriff] of county.

III. That afterward, on the day of, 19.., said attachment, on motion of the plaintiff, was vacated and set aside, and said goods returned to the possession of the plaintiff.

Or: III. That thereafter, and before the commencement of this action, upon a trial duly had of the issue raised by the said affidavit of attachment, and the traverse thereof duly made by this plaintiff, it was finally adjudged and determined by the said court that no ground existed for the issuance of the said writ [*or warrant*] of attachment, and the said attachment was discharged by said court, and said property was returned to the possession of the plaintiff.

IV. [*Allege special damage, if any, as in preceding forms, or otherwise, according to the facts.*]

WHEREFORE, etc.

955. For maliciously obtaining the appointment of a receiver in an action for closing up a partnership (adapted from complaint approved in *Luby v. Bennett*, 111 Wis. 613).

I. That said plaintiff and defendant were partners in trade in the business at the city of on the day of, 19.., and had been such for years, and that each of said parties owned one half of the property and assets of

said firm and was entitled to one half of the profits of said business, which profits amounted on the average to the sum of dollars per year.

II. That on the day of, 19.., the said defendant falsely, maliciously, and without probable cause commenced an action in the court against this plaintiff, and by his complaint therein charged that this plaintiff had clandestinely taken from the store and property of said partnership, in money and goods, the sum of dollars, and converted the same to his own use, and had sold large quantities of goods belonging to said firm without charging the same upon the books, thereby intending to collect pay for the same and convert such pay to his own use, and asked that said firm be dissolved and a receiver therefor appointed, and procured the appointment of himself as such receiver without notice to this plaintiff; that said defendant, as receiver aforesaid, took possession of said store and the stock, assets and business of said firm, and ousted this plaintiff therefrom, and afterward carried on said business as such receiver until, 19.., at a great loss to this plaintiff, and as this plaintiff is informed and believes, bought the said goods himself; and that the plaintiff has never received anything from the proceeds of the said business and sales.

III. That said action was begun by said defendant maliciously and without probable cause to believe his said charges to be true, but was brought for the fraudulent and wrongful purpose of obtaining sole control and possession of said business in order to cheat and defraud the plaintiff.

IV. That wide publicity was given to said action, and to the charges in said complaint, causing it to be widely believed that this plaintiff had been guilty of great wrongs therein, and was not honest or trustworthy in his business; that the good name and fame of this plaintiff was thereby greatly injured, and he was unable for four months thereafter to obtain employment by reason thereof; that in defending said action he was compelled to and did expend large sums of money for witnesses, expert bookkeepers, and for attorney and counsel fees, and other necessary expenses, amounting in all to dollars.

V. That the said action was tried and determined in the said court, and it was finally adjudged and decided in said action, on the day of, 19.., that the same was without foundation, and that this plaintiff was not and had not been guilty of any wrong, and judgment was awarded to this plaintiff therein.

WHEREFORE, etc.

CHAPTER LV.

COMPLAINTS IN ACTIONS FOR FALSE IMPRISONMENT.

956. For false imprisonment; short form, without special damages.

957. Another form, alleging special damage.

958. For false imprisonment under an order of arrest, void for want of jurisdiction.

956. For false imprisonment; short form, without special damages (sustained in *Nixon v. Reeves*, 65 Minn. 159 s.c. 67 N. W. 989).

I. That on the day of, 19.., at the city of, the defendant imprisoned the plaintiff for hours without probable cause, and that said act was done wilfully and maliciously in the presence of plaintiff's comrades, with the intent to humiliate and disgrace the plaintiff in the opinion of his associates.

II. That the plaintiff was damaged by reason of the premises, in the sum of one thousand dollars.

WHEREFORE, etc.

957. Another form, alleging special damage.

I. That on the day of, 19.., at, the defendant unlawfully and maliciously, and with intent to injure the plaintiff, by force [compelled the plaintiff to go with him to a police-office, or to the county jail, *or the like*, there situate, and there] imprisoned this plaintiff, and then and there detained him restrained of his liberty, for the space of hours, without reasonable cause, and without any right or authority so to do, and against the will of the plaintiff; whereby plaintiff was not only bruised and wounded, but was also injured in his credit, and was prevented from attending to his necessary affairs and business during that time, and was compelled to expend dollars costs and counsel fees in obtaining his discharge, to his damage dollars.

WHEREFORE, etc.

958. For false imprisonment under an order of arrest, void for want of jurisdiction.

I. That on or about the day of, 19.., the defendant wrongfully and maliciously commenced an action

against the plaintiff in the court of county, state of, and caused to be issued out of said court a certain pretended order of arrest in said action, and placed the same in the hands of L.... M.... the sheriff of said county for service, and caused the plaintiff to be arrested by the said sheriff, and held to bail, in the sum of dollars; and that the plaintiff was unlawfully imprisoned by the said sheriff under the said pretended order of arrest for the space of days.

II. That the said order of arrest was illegal and unauthorized, for the reason that the said court had no jurisdiction to issue said order in that [*here set forth the facts showing the want of jurisdiction, or other facts showing that the process was void*],¹ and that on the day of, 19.., said pretended order of arrest was duly vacated and set aside by order of the said court, for the reason that the same was issued without jurisdiction and was void.

III. That the plaintiff, at the time of said arrest, was engaged in business at the city of as a [*state business*] and was compelled to give up said business by reason of said unlawful arrest, and was injured in his good name and credit among his friends and fellow townsmen, and suffered greatly in body and mind by reason of the disgrace and humiliation of said arrest and imprisonment, and was also put to expense in the sum of dollars in securing his discharge from imprisonment.

IV. That by reason of the premises the plaintiff has suffered damages in the sum of dollars.

WHEREFORE, etc.

¹ If the complaint shows that the arrest was made under legal process, the facts showing that the process was void for lack of jurisdiction or other cause must be

set forth, and it will not be sufficient merely to allege that the arrest was unlawful. King v. Johnston, 81 Wis. 578.

CHAPTER LVI.

COMPLAINTS IN ACTIONS FOR SLANDER.

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| 959. For speaking words actionable in themselves. | 962. The same; for words imputing dishonesty in business. |
| 960. The same; when the slanderous words were in a foreign language. | 963. The same; for slander of an attorney. |
| 961. The same; for charge of perjury. | 964. For words spoken ironically. |
| | 965. For slander of title. |

Slander and libel are cognate wrongs, both included within the general term "defamation;" slander is oral, and libel written or printed defamation. In order to be actionable *per se*, without allegation or proof showing special damage, slander must impute a criminal offense, a loathsome contagious disorder, or charge incompetency or dereliction in duty of a public officer, or of a person in his trade or profession. On the other hand, printed or written matter, or pictures, are libelous *per se* when they impute any of the matters above mentioned, but also when they impute any charge naturally tending to bring the person charged into public disgrace, ridicule, or contempt.

Where matter is slanderous or libelous *per se*, damages may be recovered simply under the general allegation of damage, but if special damage, such as loss of employment or business, is sought to be recovered, they must be alleged specially and with particularity, and if the matter complained of is not slanderous or libelous *per se*, special damages must be alleged, or the complaint will be demurrable.

There must be publication to others in all cases. The exact words written or spoken must be alleged in the complaint. If they are not actionable *per se*, extrinsic facts must be alleged by way of inducement which show their defamatory character. If spoken in a foreign language, the exact words uttered must be set forth with a literally correct translation thereof.

Much particularity was formerly required to show their application to the plaintiff, but in most of the code states it is sufficient if the complaint states generally that the alleged libelous or slanderous matter "was published or spoken concerning the plaintiff." Wis. Stats. 1898 sec. 2677; Minn. Rev. Laws 1905 sec. 4152; Iowa Code sec. 3592; N. Dak. Rev. Codes sec.

3592; S. Dak. Rev. Codes, C. P. sec. 141; Cobbeys' Ann. Stats. of Nebr. sec. 1131.

959. For speaking words actionable in themselves.

I. That on the day of, 19.., at, the defendant, in the presence and hearing of one M.... N.... [*or, of a number of persons*], maliciously spoke concerning the plaintiff the false and defamatory words following [*set out the words complained of as accurately as possible*]; whereby the plaintiff was injured in his reputation, to his damage dollars.

WHEREFORE, etc.

960. The same, when the slanderous words were in a foreign language.

I. That on or about the day of, 19.., the defendant, in the presence and hearing of M.... N.... [*or, of a number of persons*] who understood the [Danish] language, maliciously spoke concerning the plaintiff the false and defamatory words following, in the said [Danish] language, that is to say [*set forth the words in the foreign language just as spoken*], which said words being translated signified, and were understood by the said persons hearing them to mean [*set forth a correct translation of the words into English*].

II. That by reason of the speaking of said words the plaintiff has been injured in his reputation to his damage in the sum of dollars.

WHEREFORE, etc.

961. The same, for charge of perjury.

I. That on or about the day of, 19.., at a term of the court of county, in a certain action then pending therein between A.... B.... plaintiff and C.... D.... defendant, this plaintiff was duly sworn and testified as a witness touching certain matters material to the issue therein.

II. That on the day of, 19.., the defendant intending to injure the plaintiff and to cause it to be believed that he had been guilty of perjury, in the presence and hearing of divers persons, did maliciously and falsely speak of and concerning the plaintiff, and of and concerning his testimony aforesaid, the following false and malicious words, that is to say: "He (meaning the plaintiff) lied in that case (meaning the action aforesaid)," thereby meaning that the plaintiff in his testimony had committed the crime of perjury in the said action.

III. That by reason of the premises the plaintiff has been injured in his reputation and credit, to his damage in the sum of dollars.

WHEREFORE, etc.

962. The same, for words imputing dishonesty in business.

I. That at the times hereinafter mentioned plaintiff was engaged in business as a [merchant] at and still is engaged in said business and in good reputation and credit.

II. That on the day of, 19.., the defendant, intending to injure the plaintiff, in the presence and hearing of many persons, falsely and maliciously spoke of and concerning the plaintiff in his said trade and business the false and defamatory words following, that is to say, "He (meaning the plaintiff) keeps false books." [*Or set out the slanderous words according to the fact, with proper innuendoes.*]

III. That by reason of the premises the plaintiff has sustained great loss and damage, and many persons, to-wit, A.... B...., and C.... D.... and E.... F...., who were accustomed to deal with the plaintiff in his said business have refused and still do refuse to deal with the plaintiff and the plaintiff has been thereby damaged in the sum of dollars.

WHEREFORE, etc.

963. The same, for slander of an attorney.

I. That at the times hereinafter named the plaintiff was and still is an attorney at law in good repute, duly admitted and practicing his said profession at

II. That on the day of, 19.., the defendant, intending to injure the said plaintiff in his said profession of an attorney at law, in the presence and hearing of divers persons, spoke of and concerning the plaintiff and concerning him in his profession as an attorney at law, the following false and defamatory words, that is to say [*here insert words used with proper innuendoes*].

III. That by means of the premises the plaintiff has been greatly injured in his reputation and credit, and in his business as an attorney at law, and has lost and been deprived of great profits which he would otherwise have received in his said profession, all to his damage in the sum of dollars.

WHEREFORE, etc.

964. For words spoken ironically.

I. That on the day of, 19.., said defendant, intending to injure the plaintiff, in the presence and hearing

of divers persons, in an ironical manner falsely and maliciously did speak the following false and defamatory words of and concerning the plaintiff, that is to say: "He (meaning the plaintiff) is no thief," thereby meaning that said plaintiff had been and was a thief, and said persons in whose hearing said defamatory words were spoken then and there understood that such was the meaning of said words.

II. That by reason of the speaking of said slanderous words the plaintiff was discharged from the employment of and was thereby deprived of the compensation which he would otherwise have received in such employment, to-wit, the sum of dollars per month for the space of months. [*Allege other special damage, if any.*]

WHEREFORE, etc.

965. For slander of title.

I. That the plaintiff, being the owner in fee [*or other estate*] of a certain farm, situate in the town of and county of [*briefly designate the property in question*] caused the same, on the day of, 19.., at, to be offered for sale [*or to be put up and exposed for sale by public auction*].

II. That the defendant, well knowing the premises, and maliciously and without probable cause contriving to cause it to be suspected that the plaintiff did not own said farm, and could not sell the same, and to prevent him from effecting a sale thereof, procured one M.... N.... to attend said sale, and maliciously procured said M.... N.... to state, and did maliciously then and there publicly state, through the said M.... N.... in the presence and hearing of E.... F.... [*or, of many persons then and there assembled for the purpose of bidding on said property and buying the same*] concerning the plaintiff and his said property, the false and defamatory matter following, to-wit [*set out the words complained of, with suitable innuendoes*].

III. That by reason thereof the said O.... P.... was [*or, various persons, and in particular, naming the persons referred to, who attended on said auction sale for the purpose of buying thereat, were*] dissuaded from bidding therefor, and refused and still do refuse to purchase the said property in consequence thereof; and the plaintiff has been unable to sell the same [*and has been obliged to expend dollars in and about the attendance upon said auction*] and has been otherwise greatly injured, to his damage dollars.

WHEREFORE, etc.

CHAPTER LVII.

COMPLAINTS FOR LIBEL.

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| <p>966. General form, for words libelous per se.</p> <p>967. The same; against editor and publisher of newspaper.</p> <p>968. For libel upon a professional man.</p> <p>969. For libel concerning one's business, with allegation of special damage.</p> | <p>970. For libel concerning business, by partners.</p> <p>971. For words not libelous on the face.</p> <p>972. The same; another form.</p> <p>973. For words charging official dishonesty.</p> <p>974. For libel, by effigy.</p> |
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[See headnote to chapter LVI.]

966. General form, for words libelous per se.

I. That on the day of, 19.., the defendant maliciously [composed and] published of and concerning the plaintiff, in a newspaper called the Q.... Z.... [or, in a handbill which he caused to be circulated and posted] at * the false and defamatory matter following, to-wit [*copy of the article complained of; or say, a certain article containing the false and defamatory matter following, to-wit: give extracts from the article, including all the objectionable matter*].

II. That by means of said publication the plaintiff was injured in his reputation, to his damage dollars.

WHEREFORE, etc.

967. The same, against editor and publisher of newspaper.

I. That at the time hereinafter mentioned the defendant was the editor, publisher, and proprietor [or either, as the case may be; or, the defendant C.... D.... was the editor, and the defendant E.... F.... was the publisher and proprietor] of the Q.... Z.... a newspaper published at

II. That on the day of, 19.., the defendant maliciously composed and published concerning the plaintiff in said newspaper [or, if only the publisher is sued, maliciously published concerning the plaintiff in said newspaper; or, if both author and publisher are sued, the defendant C.... D.... maliciously composed for publication, and the defendant E.... F.... maliciously published in said newspaper] [*continue as in last preceding form from the **].

968. For libel upon a professional man.

I. That at the time hereinafter mentioned the plaintiff was a physician, practicing as such, at, and was of good name and credit as such physician.

II. [*Allege publication, as in either of the two preceding forms.*]

III. That by means of said publication the plaintiff was injured in his reputation, and in his said good name and credit as a physician, and in his practice as such, to his damage dollars.

WHEREFORE, etc.

969. For libel concerning one's business, with allegation of special damage.¹

I. That on the . . . day of, 19. . ., the plaintiff was engaged in business as a merchant, in and was of good name, fame and credit as such.

II. That on said day the defendant, maliciously intending to injure the plaintiff in his said business, composed and published at, of and concerning the plaintiff, on a printed hand bill or circular [*or in a certain newspaper then and there published, called the Q. . . . Z. . . .*] the following false and defamatory matter, to-wit [*insert article*].

III. That by means of said publication the plaintiff was greatly injured in his reputation and credit, and in his business has suffered great loss of custom, and has been deprived of great gains and profits, which otherwise he would have made, and has otherwise sustained loss and injury, to his damage dollars.

WHEREFORE, etc.

970. For libel concerning business, by partners.

I. That at the time hereinafter mentioned, the plaintiffs were [and still are] partners, engaged in business as merchants in buying and selling drygoods at under the firm name of A. . . . B. . . . & Co., and were of good fame and credit as such firm.

II. [*Allege publication of libel, as in preceding forms.*]

III. That by means of said publication the plaintiffs were injured in their reputation, and in the good name and credit

¹ If special damages for loss of profits or business are sought to be recovered, the complaint must specially allege such loss and

damage with particularity and detail. Townshend on Slander and Libel, 4th ed. sec. 345.

of their firm, and in their said business as merchants, to their damage dollars.

[*Allege special damage, if any, as in last preceding form.*]

WHEREFORE, etc.

971. For words not libelous on the face.

I. That at the time hereinafter mentioned the house of the defendant had been burned down, and it was suspected that it had been feloniously set on fire.

II. That the defendant, knowing the premises, on the day of, 19.., maliciously composed and published, of and concerning the plaintiff the following false libel, to-wit: "He (meaning the plaintiff) kindled the fire (meaning the fire in the defendant's house) and I can prove it," thereby meaning that the plaintiff had feloniously set fire to said house; to the damage of the plaintiff dollars.

WHEREFORE, etc.

972. The same, another form.

I. That on or about the day of, 19.., the store building of the defendant was feloniously entered by some person unknown, and a large amount of goods and merchandise stolen therefrom.

II. That the defendant, knowing the premises, did on the day of, 19.., maliciously compose and publish of and concerning the plaintiff, in a certain letter written by him and delivered to, and read by E.... F.... and G.... H...., and by divers other persons, the following false and defamatory matters, to-wit [*here insert the defamatory words*], meaning that the plaintiff had feloniously broken into the said store and stolen the said goods.

III. That by means of which said false and defamatory publication the plaintiff has been injured in his name, fame and credit, to his damage dollars.

WHEREFORE, etc.

973. For words charging official dishonesty.

I. That plaintiff was at the times hereinafter mentioned, and still is, a citizen of the State of Wisconsin, of good fame and reputation, and was from the day of, 19.., up to the day of, 19.., the duly elected and qualified city treasurer of the city of, and was performing the duties of said office.

II. That the defendant, knowing the premises, and maliciously contriving to injure the plaintiff, and to deprive him

of the confidence and repute of the people of said county, did on the day of, 19.., maliciously [compose and] publish in a newspaper, printed and published in in said county, of and concerning the plaintiff, the following false and defamatory matter to-wit: "The city treasurer (meaning the plaintiff) is short in his accounts (meaning that the plaintiff had been guilty of malfeasance in office and could not account for the moneys which had come to his hands as such treasurer)." [*Or insert other language used, with proper innuendoes.*]

III. That by means of said false and defamatory publication the plaintiff has been injured in his reputation and good name, to his damage dollars.

WHEREFORE, etc.

974. For libel, by effigy.

I. That on the day of, 19.., at, the defendant, contriving to injure the plaintiff in his reputation, and to bring him into public contempt and ridicule, did in the public street [*or, square or common*] of said wrongfully and maliciously make, and cause to be made, an effigy or figure intended to represent the person of the plaintiff, upon which were inscribed the words "A.... B.... is a villian," and caused the said effigy to be hung up on a telegraph pole, in view of the neighbors of the plaintiff and of the public then and there assembled, by means of which the plaintiff has been greatly injured in his reputation, to his damage dollars.

WHEREFORE, etc.

CHAPTER LVIII.

COMPLAINTS FOR OTHER VIOLATIONS OF PERSONAL RIGHTS.

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| 975. For seduction of plaintiff's daughter or servant. | 980. For enticing away plaintiff's workman. |
| 976. For forcibly defiling the plaintiff. | 981. For maliciously issuing execution on a paid judgment. |
| 977. For enticing away plaintiff's wife. | 982. For maliciously filing a lis pendens. |
| 978. For criminal conversation with wife. | 983. For conspiracy between wholesale and retail dealers by which plaintiff's business was ruined. |
| 979. For alienating the affections of plaintiff's husband. | |

975. For seduction of plaintiff's daughter or servant (sustained in substance in *Parker v. Monteith*, 7 Oregon, 277).

I. That at the times hereinafter mentioned one M.... N.... was the servant [and the daughter] of the plaintiff.

II. That on the day of, 19.., at, the defendant, well knowing the said M.... N.... to be the servant [and daughter] of the plaintiff, and wrongfully contriving and intending to injure the plaintiff, and to deprive him of her assistance and service, did, wickedly, willfully, and maliciously, and without the privity or consent of the plaintiff [forcibly and against the will of the said M.... N.... abduct her, *or*, entice and persuade the said M.... N.... to leave the residence and service of this plaintiff, and did] then and there debauch and criminally know her.

III. That by reason of the premises, the said M.... N.... became pregnant and sick with child, and so remained for the space of months; that during that time she was unable to attend to the duties of her service, and the plaintiff was thereby deprived of her service and was obliged to and did actually expend dollars in nursing and taking care of her in her said pregnancy and sickness and was otherwise greatly injured, to his damage dollars.

WHEREFORE, etc.

976. For forcibly defiling the plaintiff (sustained in Koenig v. Nott, 8 Abb. Pr. 384).

I. That on the day of, 19.., at [while the plaintiff was employed as a servant in the family of the defendant] the defendant, with force and arms, ill-treated the plaintiff, and made an indecent assault upon her, and then and there forcibly debauched and carnally knew her, whereby she became pregnant and sick with child and so remained and continued for the space of months; at the expiration of which time, on the day of, 19.., she was delivered of a child, of which she was pregnant as aforesaid.

II. That in consequence of said indecent assault made by the defendant on the plaintiff, she has suffered greatly in her health, and became sick and disordered, and so continued for the space of months, during all which time she suffered great pain, and was prevented from transacting her necessary business and affairs, and has been greatly disturbed in her peace of mind and has been otherwise greatly injured, to her damage dollars.

WHEREFORE, etc.

977. For enticing away plaintiff's wife.

I. That E.... F.... is, and at the times hereinafter mentioned was, the wife of the plaintiff.

II. That in the month of, 19.., while the plaintiff was living and cohabiting with and supporting her, in, and while they were living together happily as man and wife,* the defendant well knowing her to be the wife of the plaintiff, and wrongfully contriving and intending to injure the plaintiff, and to deprive him of her comfort, society and aid [while this plaintiff was temporarily absent] maliciously enticed her away from the plaintiff's and her then residence in to a separate residence, in, and has ever since there detained and harbored her, against the consent of the plaintiff, and in opposition to his utmost peaceable efforts to obtain her from the defendant's custody, control, and influence.

III. That by reason of the premises, the plaintiff has been and still is wrongfully deprived by the defendant of the comfort, society, and aid of his wife, and has been put to great trouble and expense in endeavoring to recover her from the defendant, and has suffered great distress of body and mind, to his damage dollars.

WHEREFORE, etc.

978. For criminal conversation with wife (see Scherff v. Szadecky, 1 Abbott's Pr. 366).

I and II. [*As in preceding form to the*, continuing*]: the defendant wrongfully contriving and intending to injure the plaintiff and to deprive him of the comfort, society, aid, and assistance of his wife, on the day of, 19.., at [forcibly and without the consent of the said E.... F.... and] wickedly, willfully, and maliciously debauched and carnally knew the said E.... F.... without the privity or consent of the plaintiff.

III. That thereby the affection which the said E.... F.... theretofore had for the plaintiff was alienated and destroyed, and the plaintiff was deprived of the comfort, society, aid, and assistance which he otherwise would have had from the said E.... F.... and has suffered great distress of body and mind, to his damage dollars.

WHEREFORE, etc.

979. For alienating the affections of plaintiff's husband (adapted from Brennan v. Pasch, 7 Abbott's N. C. 249).¹

I. That the plaintiff is now, and for ten years last past has been, the wife of one E.... F....

II. That in or about the month of, 19.., and while this plaintiff was living, cohabiting with and being supported by her said husband at, and was so living with him happily as his wedded wife, and enjoying his affection, support, protection and respect, the defendant, well knowing the said E.... F.... to be the husband of the plaintiff, and wrongfully intending to injure this plaintiff and deprive her of her said husband's protection, society, aid and support, willfully, wickedly and maliciously, gained the affections of said E.... F...., and induced him to have carnal intercourse with her, and sought to persuade him and entice him by offers of money and otherwise to leave plaintiff without support and go with the defendant to the city of

III. That thereafter and at various times between the time aforesaid and the day of, 19.., the defendant continued her unlawful and wrongful intercourse with said E....

¹ Formerly this action could not be brought in Wisconsin. Lonsdorf v. Lonsdorf, 118 Wis. 159 s.c. 95 N. W. 961; following Duffies v. Duffies, 76 Wis. 374. This rule was changed, however, by Chap.

17, Laws of Wisconsin 1905. It lies in other states. Price v. Price, 91 Iowa, 693 s.c. 60 N. W. 202; Hodgkinson v. Hodgkinson, 43 Nebr. 269 s.c. 61 N. W. 577.

F.... and on or about said last-mentioned day induced and unlawfully and maliciously enticed said E.... F.... to desert plaintiff, and to leave her without means of support or protection, and to go with said defendant to the said city of at which place the said defendant has ever since harbored and detained the said E.... F.... against the will of plaintiff, and willfully and maliciously debauched him.

IV. That by reason of the premises, the said E.... F.... has become estranged from plaintiff, and his affections and regard for plaintiff have been destroyed; and plaintiff has been, and still is, wrongfully deprived by the defendant of the comfort, society, support and protection of her said husband, and the happiness and benefits she otherwise would have received at his hands, and has suffered great distress of mind, body, and estate, to her damage dollars.

WHEREFORE, etc.

980. For enticing away plaintiff's workmen (adapted from Walker v. Cronin, 107 Mass. 555).

I. That at the times hereinafter mentioned the plaintiff was, and still is, engaged in the manufacture and sale of boots and shoes than he would otherwise have been compelled to pay, and was and is necessary for plaintiff to employ a large number of persons as makers of such boots and shoes.

II. That prior to the acts of the defendants hereinafter set forth, the plaintiff did employ a large number of persons in his said business, and made large profits therefrom, and that the said defendants, well knowing the premises, did on or about the day of, 19.., with the unlawful purpose of hindering and preventing the plaintiff from carrying on his said business, willfully and maliciously persuade and induce a large number of persons who were employed by the plaintiffs as bottomers of boots and shoes, and others who were about to enter the employment of the plaintiffs and who were skilled in the art of bottoming boots and shoes, to leave and abandon the employment of the plaintiff without his consent and against his will; whereby this plaintiff lost the services of said persons and the advantages and profits which he would otherwise have made and received from the service of said persons.

III. That the plaintiff incurred large expenses in procuring other suitable workmen to take the places of those so induced to abandon their employment, and was necessarily compelled to pay much larger prices for the work of bottoming boots and shoes at and that in the prosecution of said business it greater prices than the usual market prices for such work and

labor, whereby the plaintiff suffered damage in the sum of dollars.

Or: III. That by reason of the premises the plaintiff was deprived of the services of said workmen, and was wholly unable to procure other workmen to take their places, though he made due and reasonable effort so to do, and was compelled to abandon his said business for the period of weeks, and was thereby deprived of the profits thereof [*or set forth other damage suffered*] to his damage dollars.

WHEREFORE, etc.

981. For maliciously issuing execution on a paid judgment.

I. That on the day of, 19.., in the, court of county, the defendant recovered judgment against the plaintiff for the sum of dollars, which said judgment the plaintiff fully paid on the day of, 19..

II. That on the day of, 19.., the defendant, well knowing that said judgment had been paid willfully and maliciously and with intent to injure the plaintiff caused an execution to be issued out of said court thereon, and delivered to the sheriff of county.

III. That the said sheriff, by virtue of the command of said execution, on the day of, 19.., seized and levied upon certain property of the plaintiff [*describing same*] of the value of dollars, and thereafter sold the same, whereby said property has become wholly lost to the plaintiff.

IV. That plaintiff has been damaged by reason of the premises in the sum of dollars.

WHEREFORE, etc.

982. For maliciously filing a *lis pendens* (adapted from *Smith v. Smith*, 20 Hun, 555).

I. That the plaintiff, at the times hereinafter mentioned, was and still is the owner in fee of the following described real estate [*insert description*].

II. That on the day of, 19.., the defendant, by his attorney duly authorized, caused to be filed in the office of the [*insert title of officer with whom *lis pendens* was filed*] a notice of the pendency of a certain action then pending in the court of the county of wherein the said defendant was plaintiff and this plaintiff [and others] were defendants, by which said notice it was alleged that said action had been brought to recover the interest of the plaintiff's husband E.... F.... in the said real estate.

III. That the said complaint, in said last described action, alleged and declared that the said premises hereinafter described were in fact the property of the said E.... F.... and that the same had theretofore been conveyed to the plaintiff by a certain conveyance which was without consideration, and was fraudulent and void as to said defendant, who claimed to be a creditor of said E.... F....

IV. That the allegations of said notice, so filed as aforesaid, and of the said complaint, charging that said land was in fact owned by said E.... F.... and that this plaintiff's title thereto was fraudulent and void as against the creditors of said E.... F.... were and are wholly false and were known so to be by the said defendant at the time of the commencement of the said action, and of the filing of said notice, but that the defendant notwithstanding his said knowledge of the falsity of all of said statements and allegations, willfully and maliciously caused said action to be commenced and said notice to be filed as aforesaid, with intent thereby to prevent the plaintiff from making a sale of said land, and to cause it to be suspected and believed that the plaintiff had not good title thereto.

V. That thereafter and on the day of, 19.., this plaintiff received a *bona fide* offer for the purchase of said land from one G.... H.... and could have sold the same to said G.... H.... for the sum of dollars but that in consequence of the filing of said notice, and the aforesaid allegations of said complaint the said G.... H.... refused to purchase the said land, whereby the plaintiff wholly lost the sale thereof to the said G.... H.... and has been prevented from effecting the sale thereof to any person, and has suffered damage in the sum of dollars.

WHEREFORE, etc.

983. For conspiracy between wholesale and retail dealers, by which plaintiff's business was ruined (from Bratt v. Swift, 99 Wis. 579).

I. That at the times hereinafter mentioned the defendants C.... D.... and E.... F.... were wholesale dealers in meat at the city of and the defendants G.... H.... and J.... K.... were retail dealers in meat in said city, and that between the day of, 19.., and the day of, 19.., the plaintiff was engaged in business as a retailing butcher at in said city and on or about said last named date he was forced by the said defendants, through their wrongful conspiracy hereinafter described, to quit said business,

at which he had for a long time made a profit of thousand dollars per year.

II. That at some time unknown to the plaintiff, but between the day of, 19.., and the day of, 19.., as plaintiff alleges, all the defendants engaged in the retail butcher business hereinafter mentioned, to-wit: G.... H.... and J.... K.... entered into an agreement, contract and conspiracy to and with themselves, and with the other defendants herein mentioned, in restraint of trade and commerce, particularly the retail butcher trade in the city of and its suburbs, and they entered into a combination designed to restrain, and which did menace, hinder and control the plaintiff in his said business of a retail butcher and drive him out of his means of livelihood, lessen his profits and ruin his said business, which combination is called, having a constitution and by-laws, showing a part, but not all of the purposes of said conspiracy and combination.

III. That some of the purposes of said combination so made were to monopolize the sale of butchers' meats in the city of at the expense of the people of this state, to control that trade and manage the same solely in the interest of these defendants and others so united with them, and to oppress the people and coerce the plaintiff into joining such unlawful combination, monopoly and conspiracy against his will, and to drive him out of business in case he refused to join.

IV. And the defendants C.... D.... and E.... F.... were privies thereto though not members of the said, and they so as aforesaid conspired, confederated, contracted and agreed to and with themselves, and with all other defendants, and others so as aforesaid united with them in said, and with other wholesale butchers, cold storage and packing concerns in and, to enforce the monopoly and conspiracy hereinbefore alleged, in respect to the plaintiff and the public.

V. That in pursuance of said conspiracy the defendants, the retail butchers aforesaid, at divers times between the day of, 19.., and the day of, 19.., attempted to coerce and force, by intimidation and threats of ruining his business, the plaintiff to join said conspiracy and monopoly, the said, and in pursuance of said conspiracy reported that he would not join, to all the defendants' wholesalers herein named and other wholesalers unknown to plaintiff, and charged him falsely with being guilty of unmercantile conduct, promoting excessive competition, house to house peddling, selling adulterated goods, and other things, as he is informed and be-

lieves. And in pursuance of said scheme the defendants, the wholesalers, C.... D.... and E.... F.... refused to sell plaintiff meats or goods of any kind in which they were dealing, except for prices far above those at which they sold and were selling to the other defendants, and other members of said, and refused to sell goods to plaintiff except for sums far in excess of the market price for goods he wished to purchase. And the defendants, the said retail butchers, in like manner and in pursuance of the said scheme, refused to sell to plaintiff goods they had for sale and which he wanted to buy, except for prices far above the market prices, and in excess of prices charged by them to other people.

VI. That as a result of said conspiracy between defendants and others in agreement with them and their acts, plaintiff became unable to purchase meats and other goods needed in his business, because to all practical intents and purposes, all wholesale dealers in and are in the said conspiracy, and his business was ruined and he was forced to sell out, which he did on or about the day of, 19.. ; and that it was one of the purposes of said conspiracy to make him join the said, at an expense of dollars, or more, a year, or in the alternative, to ruin his business.

VII. That the said boycott, that is, refusal to sell to plaintiff at the market price, such goods as defendants have for sale, is still maintained by all defendants against plaintiff, whereby he is prevented from engaging in the retail butcher business, and from earning a living thereby for himself and family, and the people of this state are damaged and their money extorted from them.

VIII. That by means of said conspiracy, and their acts in pursuance thereof, defendants compelled plaintiff to make a forced sale of his building situate at the places aforesaid, and of his stock of goods, and ice stored for use in his business, and to lose thereby the sum of dollars, to which extent he was specially damaged by defendants.

IX. That by said conspiracy, and their acts in pursuance thereof, defendants inflicted general damages on plaintiff to the amount of dollars or more.

WHEREFORE the plaintiff demands judgment against each and all defendants for the sum of dollars, and the costs of this action.

CHAPTER LIX.

COMPLAINTS IN ACTIONS FOR NEGLIGENCE.

984. For personal injuries inflicted by vicious dog.
985. For worrying or killing of animals by vicious dog.
986. The same, to recover double damages.
987. To recover treble damages for injuries by vicious dog.
988. For injuries from falling through open hatchway in building.
989. For injuries from falling through hatchway in sidewalk, improperly covered.
990. For flowing water from roof on plaintiff's premises.
991. For carelessly kindling a fire on defendant's land, whereby plaintiff's property was burned.
992. For undermining plaintiff's land.
993. The same, where plaintiff is the reversioner.
994. The same, where plaintiff's buildings were undermined.
995. Against a contractor, for leaving the street in an insecure state, whereby plaintiff's horse was injured.
996. For laying rubbish in the street, whereby plaintiff was thrown out of his carriage.
997. For negligently colliding with plaintiff's carriage in the highway.
998. The same, another form.
999. Against owner and contractor for injuries suffered by fall of building materials in the street during the erection of a building.
1000. For injuries from the kick of a horse allowed to run at large, contrary to the terms of a city ordinance.
1001. Complaint for injuries suffered from defective highway.
1002. Complaint against city for sidewalk injury.
1003. The same, another form.
1004. For injuries resulting from lack of guard or railing on culvert.
1005. For sidewalk injury, from lack of guard or railing.
1006. Complaint for sidewalk injury caused by loose boards.
1007. Allegation of rotten planks and hole in sidewalk.
1008. For injury on a sidewalk resulting from accumulation of snow and ice.
1009. By administratrix for death of her husband, resulting from negligent construction of a cistern by the municipality.
1010. Complaint for trespass by city officers while abating an alleged public nuisance.
1011. For negligently leaving a dangerous structure in the street.
1012. Against municipality for building a street so as to dam up a river and flow the plaintiff's premises.
1013. By passenger against railway company, for injuries resulting from negligent collision of trains.
1014. The same, where passenger jumped off the train to

- avoid injury from collision.
1015. By passenger for injuries sustained by defects in station platform.
1016. By passenger, for injuries from derailling of train by collision with cattle straying on track through defective fence.
1017. By passenger for forcible ejection from train.
1018. By husband for injuries to wife while a passenger.
1019. By employee against railroad company for injuries resulting from negligent construction and inspection of track.
1020. By employee for injury from defective track.
1021. By employee for injuries by collision.
1022. By brakeman against corporation operating a logging railroad, alleging defective equipment and track.
1023. Brakeman against railway company for injuries resulting from negligent condition of roadbed.
1024. By conductor of freight train, for injuries from cattle chute dangerously near the track.
1025. By a switchman injured by defective blocking of track.
1026. By brakeman for injuries from defective brakebeam.
1027. By section man, for injury resulting from defective brake-rod.
1028. By employee against railway company, for injuries by explosion of defective boiler.
1029. By stevedore against steamboat company, for injuries from falling through open hatchway.
1030. By brakeman for injury by negligence of engineer in operating freight engine.
1031. Against railway company for collision at crossing.
1032. The same, another form.
1033. The same, another form.
1034. By passenger in street car against railway company whose engine negligently collided with street car.
1035. By passenger against street railway company, for injuries from premature starting of car.
1036. The same, another form.
1037. By passenger against street railway company, for injuries resulting from defective insulation.
1038. By administrator, for death of person killed by collision with street car.
1039. By administrator of a person killed by gross negligence of the motorman of an interurban street car.
1040. By infant, for injuries from being negligently run over by a street car.
1041. Against railroad company, for negligently killing cattle, general form.
1042. Against railroad company for killing stock, where road is not fenced, as required by law.
1043. The same, Iowa and Nebraska.
1044. Against railroad company for negligently setting fire.
1045. By servant against employer for injuries from defective or dangerous machinery, general form.
1046. The same, by infant, or other person inexperienced in the use of tools, and who received no warning.
1047. The same, machine defective and place unsafe.
1048. By employee against employer for injuries from defective scaffold.
1049. By employee against employer for injuries by ob-

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| <p>vious defects in machinery which defendant has promised to repair.</p> <p>1050. By employee against employer for injuries suffered by reason of employment of incompetent fellow-servant.</p> <p>1051. By minor servant against employer, for injuries received in driving dangerous horse.</p> <p>1052. By servant against employer for negligent exposure to infectious disease.</p> | <p>1053. Against one who has placed an attractive and dangerous nuisance in the street, injuring child playing thereon.</p> <p>1054. Against druggist for negligently putting up a poisonous drug.</p> <p>1055. For negligently leaving horses unhitched in the street.</p> <p>1056. Against superintendent of hospital for improper treatment of a patient.</p> <p>1057. By tenant against landlord for leasing infected dwelling.</p> |
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In actions for damages resulting from the negligence of another the complaint should succinctly set forth the facts showing (1) a duty owing by the defendant to the plaintiff, (2) which has been neglected by the defendant, and (3) that the plaintiff has suffered injury as the proximate result of such neglect. It is not necessary (except in Iowa: *Gregory v. Woodworth*, 93 Iowa, 246 s.c. 61 N. W. 962) to allege the exercise of due care, or the want of contributory negligence on the part of the plaintiff, though such allegations are frequently inserted; but if the allegations of fact of the complaint conclusively show that the plaintiff was guilty of contributory negligence an allegation of due care will not avail, and the complaint will be demurrable. The statutes of the various states requiring notice of injury and filing of claim within certain periods after the accident should be carefully examined in every case. Where the liability is created by statute, as in case of highway injuries, the giving of these notices is necessary to the cause of action, and must be alleged in the complaint, but if the action arises from common law principles the giving of the notice need not be pleaded in the complaint unless the statute requires it, and the failure to give notice is a matter of defense.

984. For personal injuries inflicted by vicious dog (Wis. Stats. 1898 sec. 1620).¹

I. That on and prior to the day of, 19..., the defendant owned [and kept] a certain dog [named]*

¹ Notice to the owner of the vicious character of the dog is not necessary in Wisconsin (*Schaller v. Connors*, 57 Wis. 321), unless it

is desired to recover double or treble damages. Wis. Stats. 1898 secs. 1620, 1621, 1622. Nor is it necessary in Minnesota, North

and that on said day, while the plaintiff [in the exercise of due and ordinary care] was lawfully upon the highway [*or*, within the enclosure of G.... H....] the said dog attacked and bit the plaintiff and wounded him in the leg, whereby this plaintiff became lame, and so remained for weeks, and was thereby occasioned great pain, and prevented from going on with his business as and was obliged to and actually did expend dollars in endeavoring to heal himself of said wound, all to his damage dollars.

[*In jurisdictions where it is necessary to allege scienter, substitute prior to the * the following:* I. That on and prior to the day of, 19.., the defendant owned and kept a vicious dog well knowing him to be of ferocious and mischievous disposition and accustomed to worry domestic animals and attack and bite mankind, etc.]

WHEREFORE, etc.

985. For worrying or killing of animals by vicious dog.²

[*As in last preceding form to the * and continuing*]: and that on said day, and on other days between that and the commencement of this action the said dog [wrongfully came upon the plaintiff's land, and there] hunted, chased, bit, and worried twenty sheep and ten lambs of the plaintiff; by means whereof five of the said sheep and lambs of the plaintiff, being of the value of dollars, died, and became of no value to the plaintiff, and the residue of the said sheep and lambs of the said plaintiff, being also of great value, were injured, and rendered of no value to the plaintiff, all to his damage dollars.

WHEREFORE, etc.

986. The same, to recover double damages (Wis. Stats. 1898 sec. 1621).

[*As in last preceding form, adding thereto this allegation*]:

II. That prior to the inflicting of the said injuries, and on or about the day of, 19.., the said dog worried, chased [and killed] certain sheep [horses *or* cattle] the prop-

Dakota, South Dakota or Nebraska, *in case of worrying or killing of domestic animals.* Minn. Rev. Laws 1905 sec. 2786; N. Dak. Rev. Codes sec. 1570; S. Dak. Rev. Pol. C. sec. 2956; Cobbe's Ann. Stats. of Nebr. sec. 3217. In Iowa notice is unneces-

sary in case of injury to person or property, but plaintiff must allege and prove his own freedom from contributory negligence. Iowa Code sec. 2340; Gregory v. Woodworth, 93 Iowa, 246 s.c. 61 N. W. 962.

² See note to Form 984.

erty of one L.... M.... and on the day of, 19.., the said L.... M.... duly notified the said defendant of such last named worrying [and killing] but that the said defendant, after such notification, wholly failed and neglected to keep said dog confined as required by law, by reason of which neglect and failure the said dog inflicted the injuries upon the plaintiff's sheep first herein mentioned.

WHEREFORE, etc.

987. To recover treble damages for injuries by vicious dog (Wis. Stats. 1898 sec. 1622).

[As in Forms 984 or 985, adding thereto this allegation]:

II. That prior to the inflicting of said injuries, and on or about the day of, 19.., the said dog attacked and bit one L.... M.... and severely wounded him, and said L.... M.... on the day of, 19.., duly notified the said defendant of the fact of said last named attack and wounding.

WHEREFORE, etc.

988. For injuries from falling through open hatchway in building.

I. That the defendant, at the time hereinafter mentioned was the owner and had possession and control of a certain building and premises [*briefly designate them*] with the appurtenances thereto belonging, which building was then occupied by him as [*briefly designate the uses of the building*].

II. That said building was negligently and carelessly built, in this, that there was in the public hall or passageway in the second story of the same, at the time of its erection as well as at the time hereinafter mentioned, an unguarded hole or hatchway through the floor, opening into the first story.

III. That the defendant, well knowing the premises, did, on the day of, 19.., negligently and wrongfully leave the said hatchway uncovered and unprotected, and insufficiently lighted, by means whereof the plaintiff, who was then lawfully in said building, and in the pursuit of his business [*or, by the permission and invitation of the defendant*] then and there necessarily and carefully passing along said hall, fell through said hatchway.

IV. That by means of the premises the plaintiff was greatly hurt and injured, and became sick and lame, and so remained for a long time [*or, so still remains*] and was during the space of prevented from attending to his business as and was compelled to and did expend dollars in endeavoring to be healed of his said injuries [*or otherwise state*

injuries to plaintiff, according to the fact] to his damage dollars.

[*In Wisconsin add*]: V. That afterwards, and on the day of, 19.., the plaintiff caused to be served upon the defendant a notice in writing [a copy of which is attached, marked Exhibit A] signed by himself which notice stated the time and place where said damage and injuries occurred, a brief description of said injuries, the manner in which they were received, and the grounds on which the said claim is made, and that satisfaction thereof is claimed of the defendant.*

WHEREFORE, etc.

989. For injuries from falling through hatchway in sidewalk, improperly covered.

I. That on the day of, 19.., the defendant was [the owner and] in possession of that certain lot and store building thereon described as [*insert description*] the same being adjacent to street in the city of and that on the day aforesaid there was a certain hole or hatchway in the sidewalk on the side of said street adjoining said store building, which opened into the cellar of said building and was kept and maintained by the defendant for the purpose of receiving coal and other materials into said cellar.

II. That the defendant, on the day and year aforesaid, wrongfully and negligently permitted the cover of said hatchway to be and remain loose, so that when stepped upon it would tip up, and that by reason of said negligent condition of said cover the plaintiff, who was then and there passing along said public street, upon the said sidewalk, without fault on his part,

* In Wisconsin, in all cases of personal injuries, and in all cases of injuries to property by railroad corporations, either notice in writing must be given within one year after the accruing of the damage or the action must be commenced and the complaint served within the year. Wis. Stats. 1898 secs. 1816b and 4222 subd. 5; Laws of 1899 Chap. 307 sec. 1. These are statutes of limitation and not conditions precedent to the right of action, and the complaint is not subject to challenge by general demurrer if it contains no allegation

on the subject. *Meisenheimer v. Kellogg*, 106 Wis. 30; *Gatzow v. Buening*, Id. 1. If it is deemed best to allege that the notice was given in order to compel the defendant to admit the fact by answer this form may be used. This notice should not be confounded with the notice required to be given in actions for injuries from defective highways which is a condition precedent to the maintaining of the action and hence must be alleged in the complaint in order to state a cause of action. See Forms 1001-1008 *infra*.

fell into said hole, and thereby the left leg of the plaintiff was fractured and broken. [*State other injuries and damage.*]

[*Allege notice if necessary, as in last preceding form.*]

WHEREFORE, etc.

990. For flowing water from roof on plaintiff's premises.

I. That on the day of, 19.., the plaintiff was lawfully possessed of a dwelling house and premises, situate in the county aforesaid and in which the plaintiff and his family then resided, described as follows [*describing same*].

II. That the defendant wrongfully erected a building near to the said dwelling house of the plaintiff in a careless and improper manner, to-wit, so that the eaves thereof extended over and upon the plaintiff's said premises and building, and that by reason thereof, on said day, and at other times afterwards and before this action, large quantities of rain water ran from said building upon and into the said dwelling house and premises of the plaintiff, and the walls, ceilings, papering, and other parts thereof were thereby wet and damaged, and became less fit for habitation, to the plaintiff's damage dollars.

WHEREFORE, etc.

991. For carelessly kindling a fire on defendant's land, whereby plaintiff's property was burned.

I. That on the day of, 19.., at, the plaintiff was and still is possessed of certain lands, described as follows [*describe same*], on which there was an orchard and fences, and also a barn containing sixty tons of hay, all which the defendant well knew.

II. That the defendant on that day intentionally kindled a fire on his land next adjoining to the plaintiff's said lands, and at the distance of from the plaintiff's said land, and so negligently watched and tended the said fire that it came into the plaintiff's said land, consumed said barn and hay, of the value of dollars, and also forty-five rods of post and rail fence of the value of dollars, and killed forty-five fruit bearing apple trees in said orchard, and consumed and destroyed the plaintiff's grass growing on said land, to his damage dollars.

WHEREFORE, etc.

992. For undermining plaintiff's land.

I. That at the times hereinafter mentioned, the plaintiff was possessed of certain pasture land, being a part of his farm in the town of described as follows [*describe same*].

II. That in the month of, 19.., the defendant wrongfully and negligently excavated the land adjacent to the plaintiff's said land, and took away soil therefrom, without leaving proper and sufficient support for the soil of the plaintiff's land in its natural state, whereby it sank and gave way, to the damage of the plaintiff dollars.

WHEREFORE, etc.

993. The same, where plaintiff is the reversioner.

I. That at the time hereinafter mentioned, the plaintiff was, and still is the owner of certain land [*designate it as above*] which was then in the occupation of M.... N.... as tenant thereof to the plaintiff.

II. [*As in preceding form.*]

WHEREFORE, etc.

994. The same, where plaintiff's buildings were undermined.

I. That at the times hereinafter mentioned, plaintiff was possessed of certain land, with buildings thereon, being his house and lot in the village of [*briefly describe the premises*] which were supported by the adjacent land and the soil thereof, and that the plaintiff was entitled to have them so supported.

II. That in the month of, 19.., the defendant wrongfully and negligently excavated the land adjacent to plaintiff's said land and buildings, and took away the soil therefrom, without leaving proper or sufficient support for the plaintiff's said land and buildings, whereby the same sank and gave way, and the house fell in and was destroyed and the goods of the plaintiff were damaged and broken and the plaintiff incurred expense in procuring another house, and in removing and repairing his goods, and in removing the ruins of the house and rebuilding the same, to his damage dollars.

WHEREFORE, etc.

995. Against a contractor, for leaving the street in an insecure state, whereby plaintiff's horse was injured.

I. That at the time hereinafter mentioned, the defendant was engaged in laying pipes in and under the highway known as street, in the city of for the purpose of lighting the said highway with gas, and making the proper trenches for the purpose; and that it was defendant's duty when such pipes were laid down, to fill up properly the said trenches, and to put and leave the said highway clear and in a reasonably secure condition.

II. That the defendant and his servants, on the day of

....., 19.., accordingly took up part of the said highway, and made trenches and holes therein, and laid down said pipes, and displaced the earth and materials of the said highway, and so carelessly and negligently filled said trenches, and left the said highway in so dangerous and improper state, by reason of the lack of lights or barriers, that a horse of the plaintiff, of the value of dollars, which he was then and there lawfully driving along the said highway, sunk and fell therein, and was wounded and lamed, and rendered of little or no value, to the plaintiff's damage dollars.

WHEREFORE, etc.

996. For laying rubbish in the street, whereby plaintiff was thrown out of his carriage.

I. That the defendant, on or about the day of, 19.., wrongfully placed a large quantity of building materials and earth in the public highway [known as street] in and negligently left the same therein, obstructing the highway during the night-time, and without placing any light or signal there to indicate danger.

II. That in consequence of said negligence and improper conduct of the defendant, in the night-time of that day, the carriage of the plaintiff, of the value of dollars, with the plaintiff therein, then passing through said street, was accidentally driven against the said obstructions, and was thereby overturned; by means whereof the plaintiff was bruised and wounded [*allege injuries and damage as in other forms*].

[*In Wisconsin add allegation of notice within the year, or of timely commencement of the action as in Form 988.*]

WHEREFORE, etc.

997. For negligently colliding with plaintiff's carriage in the highway.

I. That on the day of, 19.., the plaintiff was riding with due care along the public highway, in the town of, in a chaise, drawn by a horse, both the property of the plaintiff, of the value of dollars.

II. That the defendant was then the proprietor of a stage and four horses, which were then passing along said highway in the possession of defendant [*or, of the defendant's servant*] who was driving the same.

III. That defendant [*or, that said servant*] carelessly drove and managed said stage and horses at a dangerous rate of speed and without proper guidance; that by reason of his said negligence said stage struck the plaintiff's chaise, and overthrew and

broke the same, and threw down the plaintiff's horse, breaking his leg, and threw the plaintiff out of his chaise upon the ground [or otherwise describe the accident, according to the fact], whereby the plaintiff was bruised and wounded, and was for days prevented from attending to his business and was put to great expense in repairing his chaise and in endeavoring to be healed of his own hurts, and he was obliged to kill his said horse in consequence of his leg being broken as aforesaid, to the damage of the plaintiff dollars.

[In Wisconsin add allegation of notice or commencement of action within one year, as in Form 988.]

WHEREFORE, etc.

998. The same, another form.⁴

I. [As in last preceding form.]

II. That the defendant was at the same time passing along said highway in a carriage drawn by two horses, which he was driving; and that the defendant then and there carelessly and negligently drove and managed his said horses and vehicle at great speed along said highway behind the plaintiff's horse, and that by reason of said negligence, and without fault on the part of the plaintiff, said defendant's vehicle and horses struck the plaintiff's vehicle with great force, and thereby the plaintiff was thrown from his carriage to the ground with great force and violence, and his arm, shoulder and back were seriously and permanently injured, and his body otherwise bruised and injured, from which injuries he became sick, sore and disordered, and suffered great pain, and was for a long time confined to his bed and prevented from attending to his business as a farmer; that by reason of the said negligence of the defendant the plaintiff's carriage was damaged by the breaking of an axle and wheel, in consequence of the said collision, and of the further fact that the plaintiff's horse became frightened as the result of said collision and ran away, that the plaintiff was put to expense for repairing his said carriage, amounting to the sum of dollars; and that by reason of the facts and circumstances above named the plaintiff has suffered damage in the amount of dollars.

[If notice of the injury is required to be served by the statute, allege the same as in Form 988.]

WHEREFORE, etc.

⁴This complaint is in substance *son v. Anderson*, 90 Wis. 195, the complaint in the case of *Han-* which was held to be sufficiently

999. Against owner and contractor for injuries suffered by fall of building materials in the street during the erection of a building (adapted from *Smith v. Milwaukee B. & T. Ax Co.*, 91 Wis. 360).⁵

I. That the defendant C.... D.... is the owner of that certain parcel of real estate located upon the S. E. corner of street and street, in the city of, and was at the time hereinafter mentioned erecting and constructing upon the said lot a six story brick building, and that the defendant E.... F...., by virtue of a contract previously made with the said defendant C.... D.... was doing the mason work on said building for the said C.... D....

II. That by the terms of an ordinance duly passed by the common council of the city of on the day of, 19.., which said ordinance was in effect and unrepealed at the date hereinafter mentioned, any owner or contractor who shall build or cause to be built within the said city of any building adjacent to any public sidewalk is required after the completion of the first story of said building to cause a passage way to be laid in front of said building upon the sidewalk for the convenience of foot passengers and to cause said passage way to be roofed over at a height of not less than ten feet [*or set forth the ordinance in hæc verba*].

III. That said building, so in process of erection, was at the date hereinafter mentioned within the limits of the said city of, and was and is adjacent to the public sidewalk upon the side of said street, and that the first story thereof had been completed, and that the defendants were then at work upon the third or fourth story of said building.

IV. That on the day of, 19.., at about the hour of o'clock a. m. of that day, the plaintiff was walking north upon the side of said street adjacent to said

definite and certain as to the grounds of negligence claimed, and the particular injuries received, so that a motion to make the same more definite and certain in these particulars was denied. It was said, however, that the defendant, if he desired an itemized statement of the damages, could have demanded a bill of particulars.

⁵ In the case from which this

form is adapted it was held that such an ordinance was reasonable, and that when a passer-by was injured by reason of the failure to comply with the provisions of the ordinance he could base a claim of negligence on account of the failure of the owner and contractor to comply with the ordinance, because the ordinance was framed to protect such passer-by from injury.

building, as she had a lawful right to do, and in the exercise of due care, and when she was passing in front of the said building she was struck upon the head by a brick which fell from said building a distance, as she is informed and believes, of about forty feet.

V. That the said defendants, negligently and carelessly performed work in and about the erection and construction of said building, and negligently permitted the said brick to fall which struck the plaintiff upon the head as aforesaid, and negligently failed to erect any barriers or guards over or upon said sidewalk, and wholly failed to comply with the requirements of the ordinance aforesaid, and failed to give any notice or warning to persons using said sidewalk that there was danger in walking thereon from the falling of building materials; and that by reason of such negligence and carelessness on the part of said defendants the plaintiff was injured as aforesaid, and not otherwise.

VI. That the said brick which struck the plaintiff on the head as aforesaid crushed in the skull so that pieces of the broken bones of the skull had to be extracted together with a portion of the brain, and that the plaintiff will always have a hole in the skull where said bone was so crushed, and that by reason of such accident she has suffered great pain and mental distress, and was for a long time confined to her bed; and that, as she is informed and believes, the injury to her head and brain will be permanent, and that by reason thereof the plaintiff will continue to suffer physical and mental distress for the rest of her life; all to her damage in the sum of dollars.

[*Allege notice of injury, if necessary, as in Form 988.*]

WHEREFORE, etc.

1000. For injuries from the kick of a horse allowed to run at large, contrary to the terms of a city ordinance (adapted from Decker v. McSorley, 111 Wis. 91).

I. That the defendant C.... D.... on the day of; 19.., was, and for several years prior thereto had been, a resident of the city of, a municipal corporation organized and existing under the laws of the state of, and that upon the date aforesaid, and for several years prior thereto, one of the ordinances of the said city of, duly enacted under and pursuant to the provisions of the charter of said city and the laws of said state, prohibited the running at large of horses within the limits of said city, and provided among other things that the owner or any person in whose charge such animal might be, and who should permit the same to run at large within

the limits of said city, should be liable to punishment by fine for the violation of such ordinance.

II. That on and prior to the day of, 19..., aforesaid, the defendant owned and had charge of a horse, which said horse was of a vicious disposition and in the habit of kicking and biting people, of which disposition and habit the defendant had actual notice and knowledge for a long time prior to said date; but that notwithstanding such vicious disposition of said horse and the existence of said ordinance, the defendant had been in the habit of permitting said horse to run at large within the limits of said city, and that on the said day of, 19..., said defendant, in violation of said ordinance did wrongfully and negligently permit said horse to run at large upon the streets of said city, and while the said horse was so running at large upon street, one of the principally traveled streets of said city, and the plaintiff was lawfully and with due care passing along said street without knowledge of the vicious disposition of said horse, the said horse violently kicked the said plaintiff upon the head, fracturing his skull, etc. [*allege injuries according to the fact*]; all to his damage in the sum of dollars.

[*Allege notice of injury, if necessary, as in Form 988.*]

WHEREFORE, etc.

1001. Complaint for injuries suffered from defective highway.

I. That at the times hereinafter mentioned the defendant was and still is an organized town [*or, in case of a city: a municipal corporation*] in the county of in this state, and that at said times there existed a public highway [*or street*], in said town [*or city*] much traveled by the public, known as [*give name if it had one*] extending from [*give limits or so describe it as to identify with certainty*].

II. That on and prior to the day of, 19..., the said highway was insufficient and in want of repair, in this, that a hole about two feet in depth and four feet in length [*or otherwise describe the defect according to the fact*] existed in the traveled track of the same at a point in said road [*describe place with reasonable certainty by giving distance from known points or landmarks*].

III. That said hole in said highway had existed previous to said date for at least three weeks, and was during all of that time well known to said town [*or city*] and its officers charged with the duty of inspecting and repairing highways, but that the said officers wholly failed and neglected to repair the same.

IV. That on the said day of, 19.., the plaintiff was with due care traveling in said highway in a two-horse wagon, drawn by two horses, all the property of the plaintiff, in the night-time, and by reason of the insufficiency and want of repair of said highway at the place aforesaid the forewheel of said wagon ran into said hole, and the plaintiff was thrown out of his said wagon to the ground, breaking his leg and bruising and injuring his head and body, by which injuries he became sick, sore and bruised, and suffered great pain and distress, and was for a long time confined to his bed; and that in consequence of such injuries he was compelled to employ physicians, medicines and nurses, at an expense of dollars.

V. That by reason of said fracture of his leg the same is permanently lamed, and the plaintiff made a cripple for life [*or otherwise state permanent injuries received*]; and that by reason of said injuries he was prevented from attending to his business as a for the space of weeks, and was put to great expense and loss; in all, for such injuries, expenses, and losses, to his damage dollars.

VI. [*In Wisconsin add*]: That on the day of, 19.., and within thirty days [*in case of a city or village the notice must be served within fifteen days*] after the happening of said injury above alleged, the plaintiff caused to be served on L.... M.... one of the supervisors of said town [*or, mayor of said city, or, one of the trustees of said village, according to the fact*] a notice in writing, stating therein the place where such damage occurred, substantially as above alleged, and describing generally the insufficiency and want of repair which occasioned the injuries above alleged, the injuries received by the plaintiff and that satisfaction therefor is claimed by him of said town [of which said notice a copy is hereto annexed, marked "Exhibit A" and made a part of this complaint]. [*See Wis. Stats. 1898 sec. 1339; Laws 1899 c. 305.*]

VII. [*If action be against a town*]: That on the day of, 19.., the plaintiff filed with the town clerk of said defendant town a written statement of his claim, to be laid before the town board of audit [of which written statement a copy is hereto annexed, marked Exhibit B, and made part of this complaint]; and that on the day of, 19.., the town board of audit disallowed said claim wholly; and on the first Tuesday of April, 19.., and more than ten days before the commencement of this action, the next annual town meeting of said town was held, and no action taken for the allowance of said claim. [*See Wis. Stats. 1898 sec. 824; Laws 1899 c. 14.*]

[*In case the action be against a city under special charter re-*

quiring the filing and disallowance of a claim before suit, the allegations should conform to the charter requirements.]

[In Minnesota insert the following allegation]: That on the day of, 19. . ., and within thirty days after receiving the injury herein alleged the plaintiff gave and presented to the council of the said defendant [or other governing body, naming it] a written notice of said injury and claim for compensation therefor, stating the time when, the place where, and the circumstances under which such injury and loss occurred, and the amount of compensation demanded by plaintiff from defendant for such injury and loss; and that, although more than ten days have elapsed since the presentation of such notice and claim, defendant has not satisfied said claim. [See Minn. Rev. Laws 1905 sec. 768.]

[In Iowa the action must be brought within three months unless notice of the time, place and circumstances of the injury be served on the municipal corporation within sixty days (Iowa Code sec. 3447 subd. 1), in which case it may be brought within two years, and the giving of the notice should be alleged. Robinson v. Cedar Rapids, 100 Iowa, 662 s.c. 69 N. W. 1064; Pardey v. Mechanicsville, 101 Iowa, 266 s.c. 70 N. W. 189.]

[The general statutes of the particular state, and the charter of the defendant city, if it be specially chartered, should be carefully examined, and the allegation of presentment of notice or claim should be made to conform thereto.]

1002. Complaint against city for sidewalk injury.

I. *[As in last preceding form.]*

II. That there was at the times hereinafter mentioned a sidewalk maintained by said city and greatly used by pedestrians, upon the . . . side of said street and constituting a part thereof, and that on the day of, 19. . ., and for more than three months prior thereto said sidewalk was insufficient and in want of repair in this, that at a point about 100 feet east from the corner of street *[or otherwise designate spot with particularity, and as designated in the notice]* there was a hole in said sidewalk *[describing its size and depth]*.

III. That said defendant and its officers and agents charged with the construction and maintenance of said walk had actual knowledge of the existence of said hole at the time of and long prior to the happening of the injury herein complained of, and for such a length of time prior to said accident as that in the exercise of reasonable diligence they should have repaired the same.

IV. That plaintiff on the day of, 19. . ., while

passing over said walk with due care, stepped in said hole and fell, severely spraining her ankle and knee, and painfully bruising and injuring her about the body and limbs, and especially her back and spine. That said injury is permanent in character. That as a result thereof plaintiff was confined to her bed for weeks and was compelled to employ nurses at an expense of dollars, and that she has paid out for necessary medical attendance the sum of dollars, and that by reason of said injury she has sustained damages in the sum of dollars, no part of which has been paid.

[*Allege notice and demand, as in last preceding form.*]

WHEREFORE, etc.

1003. The same, another form.

I. [*As in Form 1001.*]

II. That on the day of, 19.., the plaintiff was, in the exercise of due care, passing along said street on the sidewalk on the side thereof, and when at a point [*describe the point with certainty, as for instance: immediately in front of the house of one L.... M...., numbered on said street, and feet east of the west line of the premises of said L.... M....*] he fell and was greatly injured by reason of the insufficiency and want of repair of said sidewalk.

III. That said sidewalk was then and there insufficient in this, that a board therein had become decayed and rotten, and was then and there unsafe and dangerous, and as the plaintiff, in the exercise of due care, was walking thereon he stepped upon said board, not knowing its condition, and by reason of its decayed condition it broke through and caused him to fall with great force, breaking his ankle, spraining his knee, and dislocating his elbow and otherwise bruising and injuring him [*or otherwise state injuries received*].

IV. That by reason of said fall the plaintiff suffered great and permanent injuries, was confined for a long time to his bed, was rendered sick, sore, lame and helpless, suffered great pain, was put to expense for medical treatment and attendance, medicine and nursing, kept from his business, and otherwise greatly injured, to his damage dollars.

V. That, as the plaintiff is informed and believes, the said city, its officers and superintendent of streets, at the time of said injury and for a long time theretofore well knew of the insufficiency and want of repair of said sidewalk at the point where said injury occurred, and negligently omitted to repair the same.

[*Allege notice and claim as in Form 1001.*]

1004. For injuries resulting from lack of guard or railing on culvert.

I. [*As in Form 1001.*]

II. That on and prior to the day of, 19.., the said highway was insufficient and in want of repair in this, that at a point [*designate point with certainty*] there was a wooden culvert or bridge in said highway feet in width from east to west, and feet in length from north to south, and that at the south end of said culvert or bridge there was an abrupt descent to the ditch below of feet with no guard or railing of any kind to prevent teams or wagons from running off from the said culvert into the said ditch.

[*Allege knowledge on the part of town officers, and the happening of the accident, etc., substantially as in allegations III and IV of Form 1001, varying same according to the facts, and conclude with proper allegations of notice and claim.*]

1005. For sidewalk injury, from lack of guard or railing.

I. [*As in Form 1001.*]

II. That said highway was a much traveled thoroughfare, and that the sidewalk on the side thereof was in constant use by pedestrians.

III. That on the day of, 19.., and for a long time prior thereto said sidewalk at a point [*designate point with certainty*] was insufficient and in want of repair in this, that at the outer edge thereof there existed an abrupt descent of feet without guard or rail of any kind to prevent persons using the same from inadvertently stepping off said walk, and that the defendant and its officers had knowledge of the said insufficient and unsafe condition of said sidewalk for a long time, to-wit, for the space of weeks prior to the happening of the injury hereinafter mentioned.

IV. That on the said day of, 19.., while the plaintiff was with due care passing along said sidewalk at the place above-named he was precipitated from said sidewalk, solely by reason of the insufficiency and lack of a guard-rail aforesaid, and fell with great force [*allege injuries and damages as in previous forms, and add allegation of notice and claim as may be necessary by the statute or charter*].

**1006. Complaint for sidewalk injury caused by loose boards
(sustained in Barney v. Hartford, 73 Wis. 95).**

I. [*Allege incorporation of city and existence of street as in Form 1001.*]

II. That at the times hereinafter mentioned, and for

months prior thereto, there was upon the south side of said street and constituting a part thereof a certain sidewalk much traveled by pedestrians, consisting of wooden planks resting on wooden stringers, and that on the day of, 19.., the said sidewalk in front of the premises owned and occupied by one H.... W.... on said street between street and street, at a place about two rods west of the small gate in front of the house of said H.... W.... [where the boards of said sidewalk are laid lengthwise east and west at right angles to the adjoining boards laid north and south] was not in good nor safe repair, but was insufficient and in want of repairs in this, that said sidewalk at and about the place mentioned consisted of several wooden planks or boards laid lengthwise from east to west and adjoining planks or boards laid north and south; that said boards or planks running east and west were laid upon wooden sleepers or stringers, one at each end thereof, and one near the middle thereof; that the inside board or plank, the board there nearest the fence along said walk on the south side thereof was not nailed or fastened to any of said stringers, except insecurely at the middle of said board, but was loose at the ends; that said board or plank was so short that it did not rest, as to its ends, upon the stringers or sleepers, and was in nowise fastened at the ends, and that said board was several inches from the ground; that when one of the ends of said board was stepped upon the other end was lifted up several inches from the adjoining boards and from those running at right angles thereto on the east end thereof, leaving a dangerous space and trap in said walk; that said board was also warped, and said ends thereof were somewhat above the level of the adjoining boards; that said board was easily displaced; that the said stringers or sleepers laid to support said board were old, rotten, unsubstantial, and insufficient, and would not hold nails or spikes, and that said board was decayed at its ends,—which defects and insufficiencies were of such a degree that said sidewalk at said place was unfit, unsafe, and dangerous to travel and step upon by persons using due care.

III. That the defendant had knowingly and negligently permitted and allowed said sidewalk at said place to be and remain in the condition above set forth for several months immediately prior to and including the said day of, 19.., an unreasonable length of time, notwithstanding the said defendant had during all of said time complete and full knowledge and notice of said insufficiency and want of repair of said walk at said place.

IV. That on the evening of said day of, 19..,

the plaintiff was necessarily and carefully traveling on foot over said sidewalk, and unaware of said defective and dangerous condition, and while so traveling and entirely by reason of the defects aforesaid was caught by his right foot and ankle, and was tripped by said board at said defective part of said walk, to-wit, the east end of said particular plank or board, while said board and portion of said walk were in such condition, and while the end of said board was raised and sprung from the adjoining boards unbeknown to the plaintiff, and was thereby thrown and his said foot and ankle and leg were severely wrenched and bruised, and his said ankle severely sprained.

V. That by reason of said fall and injuries the plaintiff was made dangerously sick, sore, lamed and crippled, and was confined to his bed for several months, being deprived entirely of the use of his right leg, and suffering great pain, and that he is still unable to walk except with the aid of crutches, and will for a long time be so unable; that he was compelled to and did incur a large expense in attempting to be cured of said injuries, and still will be subjected to expense in properly treating the same; that at the time of the accident he was enjoying a large, lucrative, and profitable business as a dentist; that by reason of said fall and injuries he was for more than three months entirely unable to be at his place of business or give it any attention whatever and he is now, and will be for a long time, unable to attend properly to his usual and necessary business, and that he has sustained and will continue to sustain, great pecuniary loss thereby; that he has been obliged at great expense to hire help to aid him in his business, so that the same would not be totally destroyed, and that he will still be obliged to hire such help for a long time to come; and that plaintiff's ankle joint has been permanently injured all to his damage
..... dollars.

[*Allege giving of notice and claim, as in Form 1001.*]

WHEREFORE, etc.

1007. Allegation of rotten planks and hole in sidewalk (held sufficient in *Amos v. Fond du Lac*, 46 Wis. 695).

That a certain portion of said sidewalk in front of No. Block No. was defective, insufficient and in want of repair in this, to-wit, that the planks forming and making the said portion of said sidewalk adjoining said lot were old, decayed and rotten with holes and openings down and through the same, and that there was a dangerous hole downward through said planks which hole was oblong in shape and about fourteen inches long and four inches wide, and of lessened width toward each end

thereof, and it was about ten inches from the top of said plank down through said hole to the ground below, and said defendant had negligently provided no guards, barriers or protection to warn persons passing over said sidewalk of its defective and dangerous condition, and that by reason of the premises said walk was in an unsafe and insufficient condition for travel thereon at the time hereinafter stated, and for a long time theretofore, to-wit, for the space of three months, had been by said defendant knowingly, carelessly and negligently permitted and suffered to be and remain in such condition.

1008. For injury on a sidewalk resulting from accumulation of snow and ice (adapted from Paulson v. Pelican, 79 Wis. 445; Wis. Stats. 1898, sec. 1339, as amended by Laws 1899, c. 305).⁶

I. That at the times hereinafter mentioned the defendant was, and still is, a duly organized town in the county of state of containing within its limits an unincorporated village of more than 1000 people, known as the village of

II. That at the time of the injury hereinafter set forth, and for a long time prior thereto, there was in the said village of a street known as street, which was one of the public highways of the defendant town, and was largely used by the public generally for travel, by teams and on foot, the center thereof being used for travel by teams and a portion on the south side thereof being so used by foot travelers.

III. That on the day of, 19.., that portion of said street over which foot travelers usually and commonly pass as aforesaid was in a dangerous and unsafe condition for foot travel, by reason of snow and ice having been negligently left for a long period to-wit, for more than three weeks to accumulate along the said southerly side of said street, and especially at a point [*name the point of the accident*], which said accumulation of snow and ice became so uneven and rounded in form as to make travel along and over the said highway unsafe and dangerous; and that said accumulation existed in said unsafe and dangerous condition continuously for more

⁶ There is no liability ordinarily for an accident caused by the mere slippery condition of the sidewalk resulting from the action of the elements; but if snow and ice be allowed to accumulate in such an uneven and rounded form that it is dangerous for a traveler with due care to walk

thereon there may be liability. Paulsen v. Pelican, 79 Wis. 445. In Wisconsin the accumulation must have existed for more than three weeks before there can be any liability. Wis. Stats. 1898 sec. 1339 as amended by Laws 1899 c. 305.

than three weeks prior to the happening of the accident herein-after described.

IV. That notwithstanding it was the duty of the defendant town to keep said street at said point in a reasonably safe condition for travel by the public, and notwithstanding said town and its officers had notice of the said defective and unsafe condition of said street at the point aforesaid for a long time prior to the said day of, 19.., the said defendant and its officers neglected and failed to put said street in a safe condition for public travel.

V. That on the day of, 19.., at the hour of o'clock in the evening of said day, the plaintiff was lawfully traveling along the said south side of said street on foot, in a careful manner, when at a point [*describe the point with certainty*] owing to the aforesaid slippery and uneven condition of said street at that point, this plaintiff slipped and fell in such manner that one of his legs was broken [*state other injuries received, and the damage resulting*].

[*Allege the giving of notices required by the statutes of the particular state, as in Form 1001.*]

WHEREFORE, etc.

1009. By administratrix for death of her husband, resulting from negligent construction of a cistern by the municipality (adapted from *Mulcairn v. Janesville*, 41 Wis. 144).¹

I. [*Allege incorporation and existence of the defendant city, as in Form 1001.*]

II. That on or about the day of, 19.., the said defendant city, acting by its common council, resolved and determined to construct a certain fire cistern, at the corner of street and street, in said city, and that thereafter the said city entered upon the construction of said cistern and employed men and servants, and purchased the necessary materials for the construction thereof.

III. That on or about the day of, 19.., the

¹ As this action is based on the common-law liability of the city for a negligent act committed by its officers within the general scope of their powers while acting for the municipality and not as governmental officers, and is not based upon the statutory liability for a defective street, no no-

tice of injury, under Wis. Stats. 1898 sec. 1339 as amended by Laws 1899 c. 305, is necessary. If, however, the particular city charter or statute requires a filing and disallowance of claim before action, this should be alleged. *Ziegler v. West Bend*, 102 Wis. 17 s.c. 78 N. W. 164.

said city had made an excavation at the place above mentioned for the said cistern, and had erected within said excavation a wall along both sides of said excavation, and along the west end thereof, and that on the said date no wall had been erected at the east end thereof; and that the said walls so erected were intended to compose the sides of said cistern. That on the said day of, 19.., the said walls upon the sides of said excavation were about forty feet in length, about ten feet in height, and twenty inches in thickness, and the wall upon the west end of said excavation was about twelve feet in length, and of the same height and thickness as the other walls; that said walls were carelessly and negligently constructed by said city, in this, to-wit, that the same were composed of improper material and built in a careless and negligent manner without proper foundation or footing, resting upon the sand and gravel upon the bottom of said excavation, and further that there was a space between the outer sides of said walls and the sides of said excavation, which had been filled with loose sand and gravel and dirt, the weight of which rested against said walls, and that said walls had no props or braces to prevent them from falling inwards; all of which facts were well known to the said city and its officers upon the said day of, 19.., notwithstanding which knowledge, neither the said city nor its officers took any means to prevent the said walls from falling.

IV. That on the said day of, 19.., one L.... M.... was employed by the said defendant city as a servant to do certain work in and about said excavation, and about said walls, and that the said L.... M.... was at that time ignorant of the defective and negligent construction of said walls as aforesaid, and while the said L.... M.... was so employed and engaged in said excavation, under the direction of the defendant and in the exercise of due care, that portion of the north wall of said cistern, by reason of the negligent construction thereof and the failure to provide braces or props for the same, and by reason of the weight and pressure of the loose sand and gravel on the outside of said wall as aforesaid, fell inwards into the said excavation and upon the said L.... M...., fatally injuring him so that he died as the result of said injuries on the day of, 19..

V. That at the time of the death of the said L.... M.... as above set forth, he was, and for a long time had been a married man, and left surviving him this plaintiff, his widow, and the following named children [*name children and give their ages*], all of whom were dependent upon the said L.... M.... for support.

VI. That on the day of, 19.., upon petition duly made to the court of county, this plaintiff was duly appointed administratrix of the estate of said L.... M...., and that thereafter and before the commencement of this action, she duly qualified and is now acting as such administratrix.

[*Allege notice, if any is required, as in Form 988.*]

WHEREFORE, etc.

1010. Complaint for trespass by city officers while abating an alleged public nuisance (adapted from *Hamilton v. Fond du Lac*, 40 Wis. 47).⁸

I. [*Allege incorporation and existence of the defendant city, as in Form 1001.*]

II. That on the day of, 19.., and upon sundry other days and times of day, and before the commencement of this action, the defendant unlawfully entered upon the lands and premises of the plaintiff, lying and being in the said city of described as follows [*give description*], and dug up and carried away thousand cubic feet of earth, and thereby destroyed about 6000 surface square feet of said lot, to the damage of the plaintiff dollars.

WHEREFORE, etc.

1011. For negligently leaving a dangerous structure in the street (adapted from *Hughes v. Fond du Lac*, 73 Wis. 380).⁹

I. [*Allege incorporation of the defendant city and the existence of the street in question, as in Form 1001.*]

II. That the said street was at the times hereinafter mentioned, and still is, largely used by the citizens of the said city for public travel.

III. That on the day of, 19.., and for some years prior thereto, the defendant city owned, used and controlled a large iron and wooden roller weighing several tons, and about 6 feet high and 10 feet wide, used by the said defendant for the purpose of pressing and making more compact the

⁸ See note to Form 1009. The case from which this form was taken was a case where the city, acting under its charter powers to abate nuisances, passed an ordinance declaring a portion of a small river within the city limits to be a public nuisance, and

providing for the abatement thereof, and excavating a new channel across the plaintiff's premises.

⁹ This action is also based upon the common law liability. See notes to Forms 1009 and 1010.

various streets of said city, which said roller was and is an ungainly and unsightly object, and naturally calculated to frighten horses.

IV. That on the day of, 19.., and for some weeks prior thereto, the said roller was left by the said city and its officers at a point on the side of said street in said city, about feet west from the intersection of said street with Main street, and about feet from the north side of the sidewalk on the south side of said street, one wheel of said roller being within the south road track of said street; and the said roller thus unlawfully occupied and obstructed about one-third of said street, making the same dangerous and unsafe for travel; and that the defendant had knowledge of the situation of said roller for several weeks prior to the accident hereinafter mentioned.

V. That on the day of, 19.., at about o'clock in the evening of said day, the plaintiff was driving a single horse and carriage west upon said street, with due care, and when he came to the point where said roller was situated as aforesaid, his horse became frightened and unmanageable at said roller, and escaped from the plaintiff's control, and ran away, partially overturning the carriage and throwing the plaintiff upon the ground with great violence, thereby seriously injuring him [*state injuries*], to the damage of the plaintiff dollars.

1012. Against municipality for building a street so as to dam up a river and flow the plaintiff's premises (adapted from *Spellman v. Portage*, 41 Wis. 144).

I. [*Allege incorporation and existence of defendant city, as in Form 1001.*]

II. That the said city has, by virtue of its charter, the care and control of all its streets within the corporate limits of said city and the right and duty to build and grade the same, and that the defendant, by its agents and servants, in the year 19.., graded and built a raised highway in said city and still maintains the same, leading from the bridge across the river, southwesterly to the limits of said city, a distance of about one mile.

III. That in building and making said highway the said city raised the grade thereof above the level of the surface of the surrounding ground about 4 feet, and that the said street is built upon and across a large flat tract of marsh land dividing the Wisconsin and Baraboo rivers, over a large part of which tract of land water runs from the Wisconsin to the Bara-

boo River at every stage of high water, which is very frequent; that in constructing the said road, the same ought to have been so constructed that the water could pass through said road without obstruction, and for that purpose said road should have been supplied with sufficient sluices and culverts at short intervals for the passage of said water over said flat tract of land from the Wisconsin River to the Baraboo River, as has been the usual and accustomed course of said water from time immemorial; but that the said defendant, disregarding its said duty, by its agents and servants negligently built and constructed the said graded road without providing the same with culverts, bridges and sewers so as to enable the waters of said Wisconsin River to pass through and flow in the natural and accustomed course into the Baraboo River, and that on account of the said negligent and unskillful construction of the said road said waters of the Wisconsin River, at high water, during the month of, 19.., were obstructed by the said road and grade, and were caused to flow back upon and submerge lots [*describe property*], which lots were then owned and occupied by the plaintiff, and to submerge, drown, injure and destroy the crops thereon, the property of the plaintiff; all to his damage in the sum of dollars.

WHEREFORE, etc.

1013. By passenger against railway company, for injuries resulting from negligent collision of trains.

I. That the defendant is and was at the times hereinafter named a railroad corporation duly organized under the laws of the state of and operating a commercial railroad between the city of and the city of in said state, carrying passengers and freight thereon for hire.

II. That on the day of, 19.., the plaintiff purchased from the defendant a ticket entitling him to safe transportation on defendant's said railroad from to and thereupon boarded one of defendant's trains, and was received as a passenger thereon.

III. That while the plaintiff was upon said train on said day of, 19.., and was being transported as a passenger thereon, said train was so negligently and carelessly operated and managed by the defendant and its servants in control thereof * that the same violently collided with another train of the defendant at whereby the car in which plaintiff was riding was thrown from the track and upset, and the plaintiff was violently thrown from his seat, and his right leg fractured and his head and chest bruised, by reason of which injuries he was for a long time sick and confined to his bed and rendered

permanently lame in said leg, and was also prevented from attending to his business as a for the space of weeks, and compelled to expend for medical services and nursing the sum of dollars, all to his damage in the sum of dollars.

[*If by local statute notice or filing of claim is necessary before action allege the giving of same. See Form 988 and note.*]

1014. The same, where passenger jumped from train to avoid injury from collision.

[*As in last preceding form to the * and continuing*]: that a violent collision was imminent, and did in fact actually occur, with another train of the defendant upon its said track at and that by reason of the imminence of such collision there was great danger that the plaintiff would be severely injured or killed if he remained upon the said train; and that in order to escape such danger and save his life this plaintiff, just prior to the moment of such collision was compelled to and did jump from his said train to the ground, and in so doing broke his leg and [*state other injuries received, and damage, according to the fact*].

[*Allege notice, if necessary, as in Form 988.*]

1015. By passenger for injuries sustained by defects in station platform.

I and II. [*As in Form 1013.*]

III. That at the station of said defendant, at said city of there was maintained by said company a wooden platform adjacent to the railroad of said defendant, for the accommodation of its passengers, and at which the trains of said company stopped for the purpose of receiving and discharging passengers, which said platform was insufficient and dangerous in this [*state defect particularly, as: that there was a deep hole therein, stating size and location*]; and that the plaintiff, while alighting from said train on said platform in the night-time, without fault on his part, inadvertently stepped into said hole, throwing him to the ground and breaking his leg [*or otherwise state the injuries received, and the damages*].

[*Add allegation of giving notice, if necessary, as in Form 988.*]

1016. By passenger, for injuries from derailing of train by collision with cattle straying on track through defective fence.

I and II. [*As in Form 1013.*]

III. That said defendant was required by law at that time, to erect and maintain, on both sides of its track, good and suffi-

cient fences of the height of four and a half feet along its said road [*or describe the fence prescribed by the particular statute*], but that said defendant failed and neglected to keep up and maintain said fences, and negligently and knowingly allowed and suffered the same to be insufficient and out of repair.

IV. That by reason of such insufficiency and want of repair a number of cattle depasturing on the lands of one A.... B...., adjoining said track, in the town of county of escaped through said defective fence upon said track, and that the defendant so negligently and unskillfully ran and operated said train by its agents, conductor and engineer in charge of the same, that the said train on the day aforesaid ran into and against said cattle, and thereby the car in which plaintiff was riding was derailed and upset, and thereby the said plaintiff received severe injuries, his shoulder was broken, his spine injured, his skull fractured, and other bruises and injuries sustained, whereby he was made sick, sore, lame and disabled, and for a long time confined to his bed and helpless, and rendered permanently a cripple [*or otherwise describe injuries according to the fact*].

[*Allege notice, if required, as in Form 988.*]

1017. By passenger for forcible ejection from train.

I and II. [*As in Form 1013.*]

III. That the defendant, by its officers and servants in charge of said train, at a point on the line of its said railroad, about miles east from the station of [the same not being a usual stopping place nor near any dwelling house]¹⁰ unlawfully and with force and violence ejected the plaintiff from said train and refused to permit him to ride further thereon.

IV. That by reason of said ejection, and the violence so used by defendant's servants, the plaintiff was severely bruised about the face and body and suffered great pain of body and humiliation, and was delayed in his business; all to his damage in the sum of dollars.

[*Allege notice, if necessary, as in Form 988.*]

¹⁰ This clause is not essential where the passenger has a ticket, or has paid his fare or offers to pay it. The statute of Wisconsin prohibits the ejection of a passenger at any place except a usual stopping place, or near a dwelling house. Wis. Stats. 1898 sec. 1818; Phettiplace v. N. P. R. R., 84 Wis.

412. Hence, if the ejection was not at one of the named places, it is well in Wisconsin to allege the fact, so that even if defendant should prove that the plaintiff refused to pay his fare, there might still be a recovery on account of the ejection at a place unauthorized by law.

1018. By husband for injuries to wife while a passenger.

[After alleging that plaintiff is the husband of the injured person, follow preceding forms in statement of the incorporation of the defendant, its business as a carrier, the purchase of a ticket, the transportation of the injured person, the negligence of the company, and the resulting injuries, with necessary changes of verbiage to show that the plaintiff's wife was the injured person, and continue]:

V. That by reason of the premises the plaintiff has been put to great expense, and will continue to be subjected to great expense in procuring necessary medical and surgical attendance, care and suitable nursing for his said wife, and has been and will be hereafter put to great loss and expense in money by the loss of her services, by reason of her permanent injuries and physical disabilities caused by such injuries, and has lost the comfort of the society and health of his said wife, in all to his damage dollars.

[Allege notice, if necessary, as in Form 988.]

1019. By employee against railroad company for injuries resulting from negligent construction and inspection of track (adapted from Crouse v. R. R. Co., 102 Wis. 196).

I. *[As in Form 1013.]*

II. That the plaintiff, on and prior to the day of, 19.., was an employee of said defendant as an engineer, running a freight train from the city of to the city of and on said last named day was operating a locomotive engine for defendant in hauling a train from to

III. That while so operating said engine and train, with due care, and at about the hour of 11:30 o'clock in the evening of said day, the plaintiff with his said train arrived at a point about one and one-half miles north of the city of and ran into a washout or hole in the defendant's said track, derailing said train and greatly injuring the plaintiff as hereinafter set forth.

IV. That at the place where said washout occurred the defendant had prior to said day of, 19.., constructed under its said track a small wooden culvert for the passage of water under its track, and that said culvert was too small for the purpose for which it was intended, was improperly located, and that defendant had prior to said date carelessly and negligently excavated and removed large quantities of gravel from the immediate vicinity of said culvert, thereby

greatly weakening the same and the track of the defendant at that point, and leaving the said culvert and roadbed insufficient and defective, and liable to be washed out, all of which defects and insufficiencies were known to the defendant and its servants in charge of said roadbed, but unknown to the plaintiff.

V. That on the evening aforesaid a heavy rain commenced to fall at the point of said washout and in the surrounding country, and continued for a number of hours prior to the time when plaintiff's said train arrived at said point, and that both defendant's section foreman, whose duty it was to inspect the defendant's track at that point, and defendant's roadmaster, whose duty it was to inspect said track and the culverts therein and their supports, and repair the same, negligently failed and neglected to inspect said track and culvert on said night, and failed to warn the plaintiff and the trainmen upon said train of said washout, and said roadmaster prior to the evening aforesaid negligently allowed and directed the servants of said company to excavate the earth and gravel near said culvert and track, thereby greatly weakening the same and making the same unsafe and dangerous for the passage of trains, all of which facts were unknown to the plaintiff.

VI. That by reason of the said defective, improper and inadequate construction of said culvert and track, and the negligent excavation of gravel about the same the said culvert and track were washed out for a considerable distance on the evening aforesaid, by the water accumulating from said rain, which fact was unknown to the plaintiff and could not have been ascertained by the plaintiff in the exercise of reasonable care, and solely by reason of the said washout so negligently caused, and the failure of the defendant's servants in charge of said track and culvert to inspect the same and warn the plaintiff of said washout, the said train was precipitated into said hole or washout, and the plaintiff was thrown from his engine and suffered great bodily injuries [*state injuries particularly*].

[*Allege notice of injury, if required, as in Form 988.*]

1020. By employee for injury from defective track (sustained in *Lyman v. C. V. R. R.*, 59 Vt. 167).

I. [*As in Form 1013.*]

II. That at the times hereinafter mentioned plaintiff was employed by defendant as master and tender of the drawbridge at forming a part of defendant's said road, and as such employee, in discharge of his duty, frequently passed over said road upon defendant's locomotives and cars from to

III. That it became and was the duty of the defendant to provide a suitable, safe and sufficient roadbed and track, and to use due and proper skill, care and diligence in providing a suitable, safe and sufficient roadway for the passage of said locomotives and cars to and fro over said railroad.

IV. That the said defendant, disregarding and neglecting its duty aforesaid, did not then and there provide a suitable, safe and sufficient roadbed and track for the passage of said locomotives and cars to and fro over said railroad; but, on the contrary thereof, did negligently and carelessly provide a roadbed and track which was insufficient, unsuitable and unsafe for the passage of locomotives and cars over the same, whereby and by means of the unsuitable, insufficient and unsafe condition of said roadbed and track, and on or about the day of, 19.., a certain locomotive of the defendant, whereon said plaintiff was then and there riding for the purpose of being able to attend to his duties at said drawbridge without delay, when the same should be reached by said locomotive, according to the course of his said employment and in pursuance of his duties therein, was thrown from the track and thrown down the embankment of said railroad.

[Allege injuries and damage, and service of notice of injury, if required.]

1021. By employee for injuries by collision.

I and II. *[As in Form 1019.]*

III. That it was a part of plaintiff's duty as such engineer, by reason of express regulations and directions given to plaintiff by the defendant, to stop his said train each day at and there pass a certain other locomotive and train upon defendant's railroad which ran from to

IV. That the defendant, on the day of, 19.., changed the place of meeting of said trains from to, said change to take effect on the ensuing day, to-wit, on the day of, 19.., without giving the plaintiff notice of said change, by reason of which change, while the plaintiff was proceeding in the capacity of engineer of said locomotive, with the train thereto attached, from to on the day of, 19.., according to the previous express direction of said defendant, and while between and on said railroad, the plaintiff's train and said other train, with their locomotives, came into collision without fault on the part of the plaintiff, and the plaintiff was severely injured *[state injuries and allege notice, if necessary]*.

1022. By brakeman against corporation operating a logging railroad, alleging defective equipment and track (adapted from *Haley v. Jump River L. Co.*, 81 Wis. 412).

I. That at the times hereinafter mentioned the defendant was and still is a corporation organized under the laws of the state of and was operating a logging railroad in the county of in said state running from to

II. That on and prior to the day of, 19.., the plaintiff was an employee of said defendant as a brakeman on defendant's trains on said logging railroad, and on said last named day was riding upon one of the logging trains of said defendant drawn by a locomotive engine over said logging railroad, engaged in the performance of his duties as brakeman aforesaid.

III. That the said defendant, on and prior to the date aforesaid, negligently failed to provide a safe and suitable roadbed for the track of said logging railroad, in that the same was very rough and uneven and allowed so to remain, and negligently failed to provide any suitable or safe place upon its logging cars for the plaintiff to perform his duties as brakeman, and failed to provide suitable and safe appliances for fastening the logs upon its cars, and did not provide chains of sufficient strength for such purpose, but did provide certain weak, broken and patched chains totally insufficient and unsuitable for such purpose; and that for about ten days before said date the defendant negligently allowed several large logs to remain on said roadbed parallel with said track and so close thereto as to be an obstruction to cars loaded with logs thereon.

IV. That on said day of, 19.., said defendant was operating said railroad by its servants and agents, and transporting over the same said train composed of a number of cars, drawn by said locomotive engine, and that said cars were heavily loaded with logs, and that each load was negligently and carelessly fastened upon the car upon which it rested by means of one of said weak, small, improper, and unsuitable chains; that this plaintiff, acting as the agent and servant of said defendant, and in the lawful and proper performance of his duty, was riding upon said train, and was standing at one of the brakes upon said cars; that while so riding as such agent and servant, and while so lawfully performing his said duty, and when said train was running over said railroad, and at a point about a mile and a half distant from the village of in said county, one of said loaded cars in front of the car upon which

this plaintiff was so lawfully standing came in contact with one of the said logs so negligently allowed to remain alongside said railroad track, as aforesaid, the chain which bound the logs upon said car gave way and broke, and the said logs, which were bound by said chain to said car, fell, or partly fell, from the said car upon which they were loaded, and some of them falling with their front ends to the ground, or against said logs so negligently allowed to remain along-side said track, caused the logs upon the car upon which this plaintiff was standing to be thrown back upon him, so that this plaintiff was caught between two of said car-loads of logs, and by reason of the negligence of said defendant in so failing to provide suitable and proper chains to bind the logs upon said cars, and in so failing to keep its said roadbed in proper condition and free from obstruction, and with no want of care on his part, this plaintiff sustained the injuries hereinafter mentioned.

[State injuries received and damage, and service of notice, if required, as in Form 988.]

1023. Brakeman against railway company for injuries resulting from negligent condition of roadbed (adapted from Hulihan v. G. B. W. & St. P. Ry. Co., 58 Wis. 319).

I. [*As in Form 1013.*]

II. That the plaintiff, on and prior to the day of, 19.., was in the employ of the defendant as brakeman upon one of its freight trains, and that his duty as such required him to go between freight and other cars for the purpose of coupling and uncoupling the same, using the appliances therefor provided by the defendant, and that it was the duty of the defendant to provide safe and suitable appliances therefor, and to keep its track in repair and free from obstructions, as well along the side of the track as within it, so as not unnecessarily to expose its employees to the danger of personal injuries.

III. That notwithstanding the said duty of the defendant, the defendant did, on or about the day of, 19.., and for a long time prior thereto, carelessly and negligently suffer and allow loose blocks of firewood and the like to lie scattered about near its track and along the roadbed near a station on said road called, upon the station grounds on the west side of the said station of, at a point where the said plaintiff and other brakemen were obliged, in performing their duties, to run along the side of said track and couple and

uncouple cars, thereby rendering the performance of the plaintiff's duties unnecessarily dangerous to the plaintiff.

IV. That on or about said day of, 19.., and at or near the said place or station called, while the said plaintiff was in the employ of said defendant, as aforesaid, it became the duty of said plaintiff, as brakeman, and necessary that he should go quickly between a box car and a flat car to make a coupling, so called,—that is, to couple the box car which was being pushed towards the flat car which was standing, to the flat car; that said plaintiff attempted to do so, as he was in duty bound to do, when his toe or foot struck against one of the said pieces or blocks of wood or fire-wood, without any negligence or carelessness on his part, but wholly through the shiftlessness and carelessness of the said defendant, as hereinbefore set forth, and said plaintiff was thrown with great force head-first in between said cars, and to save himself from being cut in two, he caught hold of the draw-bar of the flat car at the same time as the draw-bar of the box or moving car came in collision with it smashing two fingers of the left hand of said plaintiff, and permanently and for life maiming and crippling a third finger, so that two fingers had to be cut off entirely, and the third left comparatively useless; that said accident was caused wholly by the shiftlessness and carelessness of said defendant in allowing its said track, and the margins thereof, to be incumbered and obstructed by the said loose blocks of wood, and without any fault whatever on the part of said plaintiff.

[*Allege service of notice, if required.*]

1024. By conductor of freight train, for injuries from cattle chute dangerously near the track (adapted from *Dorsey v. Philips & Colby Construction Co.*, 42 Wis. 583).

I. [*As in Form 1013.*]

II. That prior to the time hereinafter mentioned the defendant made and constructed a stock-yard near its track, in the town of in said county, and to facilitate the loading of live-stock from the said yard into and upon its cars, a chute or passage-way was constructed by the defendant from the said yard to the track of said railroad, so that said live-stock could be driven from said yard across said chute and upon the cars of the defendant standing upon the said railroad in front of the said passage-way; and the plaintiff alleges that the said chute or passage-way was negligently and improperly built so as to project so near to the track of the said railroad as to greatly endanger the lives and persons of the servants and em-

ployees of the said defendant operating the freight trains over said railroad at the place where said chute or passage-way was located.

III. That on the day of, 19.., the plaintiff was in the employment of defendant in the capacity of conductor of a freight train then passing over and along said railroad, and that at a point a few rods north of the said stock-yard a side-track branched from the main line and ran past the said chute or passage-way to the depot in said town of; that in the course of the plaintiff's duty it was necessary for him to transfer a number of said cars from the said main line to the said side track, and to assist in the uncoupling of said cars; and that while in the act of thus assisting and in the exercise of due care and caution, the plaintiff in necessarily ascending to the top of one of said cars by means of the ladder on the side thereof, was carried by said car against said chute or passage-way, and pressed between the same and said car, by means whereof he was greatly bruised and wounded in his person, and one of his legs crushed and broken [*allege other injuries, if any, and the damage suffered*].

[*Allege notice of injury, if necessary.*]

1025. By a switchman injured by defective blocking of track
(adapted from *Paine v. Eastern Ry. Co.*, 91 Wis. 348).

I. [*As in Form 1013.*]

II. That on and prior to the day of, 19.., the defendant owned and controlled a certain railway yard, tracks, frogs and switches therein, for the transaction of its business as a common carrier in the city of, together with the cars and locomotive engines thereon, and that on said day of, 19.., the plaintiff was in the employ of the defendant as a switchman in the said railway yard, and as such switchman was required to assist in the switching, braking and coupling of cars in the said yard, and on the said day it became and was his duty to accompany and set the brakes upon certain freight cars which were then being moved by the defendant and its servants through said yard and past a certain frog and guard-rail in said yard, near [*locate the place with exactness*].

III. That it was the duty of the defendant to keep the space between the guard-rail and the main rail at said point properly and sufficiently guarded or blocked so as to prevent injury to employees, but the said defendant, not regarding its said duty, wrongfully and negligently neglected and omitted to properly and sufficiently guard or block said space, so that the said space

became a dangerous trap to brakemen and other employees in the use of said yard, and in consequence of the said failure to block the said space the foot of the plaintiff while he was engaged in the proper discharge of his duty as aforesaid became caught and held fast in said space between the guard and main rail, whereby the plaintiff was held and run over by one of the cars of said defendant, and suffered great injury [*detail injuries received*].

III. That the defendant had notice and knowledge of the said defective condition of the said guard or block long before the time of said injury, but that the said plaintiff had no knowledge thereof.

[*Allege notice, if necessary, as in Form 988.*]

1026. By brakeman for injuries from defective brakebeam
(adapted from *Wedgewood v. C. & N. W. Ry. Co.*, 41 Wis. 479).

I. [*As in Form 1013.*]

II. That the plaintiff, on and prior to the day of 19.., was in the employ of the defendant as brakeman, running upon a freight train daily over that certain portion of the defendant's road from the city of to the city of and that it was the plaintiff's duty, when occasion should require, to go between the freight cars of said company and couple them together and uncouple them, with such machinery, appliances and fixtures as the defendant provided therefor; that in operating its said road it was the duty of the defendant to see that the cars and other rolling stock used thereon were safe and suitable for the business, so as not to unnecessarily endanger the lives and limbs of its employees and servants.

III. That on or about the day of, 19.., the defendant carelessly and negligently, and contrary to its said duty, did take upon its said road, and use and operate a certain freight car upon the brake-frame or brake-beam of which, at the end of said car, was a large and long bolt, which unnecessarily and carelessly was allowed to project beyond the frame or brake-beam, and in the way of the brakeman when about to couple or uncouple the car with another car; that the defendant negligently suffered the said bolt to remain without cutting off the projecting part thereof and without informing the plaintiff of its dangerous condition, although it had full knowledge thereof; that the plaintiff, while in the performance of his duties as brakeman aforesaid, at the station of in the county of, and while going between said car and another car to

couple them together, and in the exercise of due care, struck said projecting bolt with his foot, and was tripped and thrown down, and his leg crushed [*state the injuries received*].

[*Allege service of notice, if necessary, as in Form 988.*]

1027. By section man for injury resulting from defective brake rod (adapted from Cowan v. C. M. & St. P., 80 Wis. 284).

I. That the defendant was, at the times hereinafter named, and still is, a railway corporation incorporated under the laws of this state, and engaged in operating passenger and freight cars upon railway tracks in said state, and especially through, to and from the city of Menomonie, in said state.

II. That at the time of the happening of the injury hereinafter stated, the plaintiff was in the employ of the defendant as a section man, and was required by his duties to be upon the tracks of the defendant at and about said city of

III. That on the day of, 19.., and for a long time prior thereto the defendant had negligently kept in its possession and used a freight car which was defective and unsafe in this particular, that an iron rod connected with the brake of said car and upon which tension was put in setting the brake, was unsafe and defective by reason of being broken nearly in two, which said broken condition had existed for a long time and was open and observable and easily discoverable upon inspection, and of which said breaking the defendant long prior to the happening of the injury hereinafter set forth had notice, and all of which was unknown to the plaintiff.

IV. That on the said day of, 19.., the defendant wrongfully and negligently had the said car in use upon one of its tracks at said city of, and was endeavoring to make a flying switch upon the side track at a brick-yard, about a mile and a half from which side track upon the main track there was a sharp descent, and upon making said flying switch defendant's employees detached said defective car from the others, and sent it down said descending track, unattended save by a person in charge of the said car, who could have stopped the car had not said brake-rod broken; that in attempting to set the brakes upon said car and stop the same, the said brake-rod broke at the said defective place hereinbefore mentioned, and the said car became unmanageable and rushed down said track and came upon the main track without the knowledge of the plaintiff, who was lawfully upon the said track, and struck him [*state injuries received and damages resulting*].

[*Allege notice, if necessary, as in Form 988.*]

1028. By employee against railway company, for injuries by explosion of defective boiler.

I. [*As in Form 1013.*]

II. That the plaintiff, on the day of, 19.., at the time of the committing of the grievances hereinafter mentioned, was in the employment of the defendants, as fireman upon a locomotive engine, the property of the defendants, driven by steam upon their road; and it was the duty of the defendants to provide a good, safe, and secure locomotive, with good, safe, and secure machinery and apparatus.

III. That yet the defendants, not regarding their duty, conducted themselves so carelessly, negligently, and unskillfully in this behalf, that they provided and used an unsafe, defective, and insecure locomotive, of which they had notice.

IV. That for want of due care and attention to their duty in that behalf, on the day and at the place aforesaid, and while the said locomotive was in the use and service of the defendants upon their said railroad, and while the plaintiff was on the same in the capacity aforesaid, for the defendants, the boiler connected with the engine of the said locomotive, by reason of unsafeness, defectiveness, and insecurity thereof, exploded, whereby large quantities of steam and water escaped therefrom and fell upon the plaintiff [*allege injuries received*].

V. That by reason thereof the plaintiff became, and for a long time remained ill; and was obliged to, and did, expend about the sum of dollars in attempting the cure of himself, and was for a number of weeks prevented from pursuing his business, and was otherwise injured, to his damage dollars.

[*Allege notice of injury, if necessary, as in Form 988.*]

1029. By stevedore against steamboat company, for injuries from falling through open hatchway (adapted from *Haley v. Western Transit Co.*, 76 Wis. 344).

I. That the defendant was at the times hereinafter named, and now is, a corporation organized and existing under the laws of the state of and engaged in the business of transporting goods for hire as a common carrier upon the Great Lakes, and that in the transaction of such business the defendant owns and operates a number of steamboats, and keeps a warehouse and depot in the city of; and among the steamboats so owned and used by the defendant is a steamboat called

II. That the plaintiff for more than three years last past has been a stevedore or laborer in said city, and was able to earn

prior to his injuries hereinafter named the sum of twelve to fifteen dollars per week as such stevedore.

III. That on the day of, 19.., the said steamboat arrived at said city of, with a load of goods and merchandise, and was moored at the said dock on said day, and on said day the plaintiff, with others, was employed to remove the cargo from said vessel, a part of which cargo was placed upon what is known as the main deck of said vessel, through which deck there is a large hatchway, several feet square, leading down to the hold of said vessel.

IV. That it is the custom of steamboats like the said to keep such hatchways, when not in use, closed, and that it is also the custom when such hatchways are open at night to provide lamps on the sides thereof, but that the defendant on the night of said day of negligently and wrongfully failed to place any cover or hatch on the said hatchway, but left the same open and unprotected, and without lights or lamps near the same.

V. That pursuant to his employment, the plaintiff went upon the said main deck of said steamboat, and commenced work in removing said cargo from said main deck shortly after eleven o'clock on the night aforesaid, and continued at such work until about half past one in the morning of the following day; that at about the time last aforesaid, and while still engaged in said work, and while he was necessarily and carefully passing along said main deck, with due care, he accidentally fell through said open hatchway, and fell with great violence into the hold of said vessel, and struck upon his head, back and shoulders and that until he fell into said hatchway he was wholly unaware of said danger, and wholly unaware that the said hatchway was open.

[State injuries received and damage suffered.]

[Allege giving of notice, if necessary, as in Form 988.]

1030. By brakeman for injury by negligence of engineer in operating freight engine (adapted from Baltzer v. Railway Co., 83 Wis. 459).

I. That at the times hereinafter mentioned, and prior thereto, the defendant was and still is a corporation engaged in operating a railroad running through the village of in the state of

II. That on or about the day of, 19.., the plaintiff was an employee of said defendant as head brakeman on a freight train of said defendant, making regular trips from in the state of to, by way of the village of aforesaid.

III. That on the said day of, 19.., at about o'clock in the morning, while it was still dark, and while the said train and its crew were employed in doing switching in the said village of, it became the duty of the plaintiff, together with the engine and the engineer operating said engine, to proceed, and they did go on to a certain side track of said defendant in the depot grounds of the said village of, to couple on to three flat cars that stood thereon near the extreme east end of said side track, and said engine was caused to go forward towards said cars on said side track with the front end forward.

IV. That the said engineer, while operating said engine on said side track, did carelessly and negligently cause said engine to run over said side track at an unusually fast rate of speed, and was not giving his attention to his duties while managing his said engine, and that this plaintiff stood upon the pilot of said engine, as it was necessary and proper for him to do in order to couple the said engine on to the said flat cars. That when said engine reached said cars the plaintiff proceeded to attempt to couple the said engine on the said cars, as was his duty, and while in the act of attaching the pilot bar of said engine to the coupling head of said cars, the said engine being in motion, suddenly and without warning to this plaintiff the said engineer carelessly and negligently checked the speed of said engine with such force as to throw the plaintiff forward, causing him to fall between the engine and the car when they collided together, whereby the plaintiff's arm was caught between the engine and the car [*state other injuries received, if any*].

[*Allege service of notice, if necessary, as in Form 988.*]

1031. Against railway company for collision at crossing.

I. [*As in Form 1013.*]

II. That on the day of, 19.., the plaintiff was traveling, with due care, in a wagon drawn by two horses, along a public highway in the town of in said county, which crosses said railroad about miles north of the city of [*or otherwise describe and locate the crossing with certainty*]: and as plaintiff reached said public crossing defendant ran one of its locomotives, with a train of cars attached, across said highway at said crossing at a great and negligent rate of speed and without warning of any kind, so that by reason of the said negligent operation of said locomotive and train the said locomotive struck the horses which the plaintiff was driving, and killed them and destroyed the harness and wagon, and threw plaintiff

out upon the ground with such force as to break his leg [*or otherwise state injuries*].

III. That plaintiff was the owner of said horses, harness and wagon and that the same were worth dollars.

IV. That plaintiff necessarily spent dollars for medical attendance and medicines in an endeavor to cure himself of said injuries, and for a period of months was unable to attend to his business as in consequence of said injuries and is permanently injured so that he will never be able again to carry on said business as efficiently as before, and was otherwise greatly injured, all to his damage dollars.

[*Allege notice, if necessary, to be served before action, as in Form 988.*]

1032. The same, another form.

I. *As in Form 1013.*

II. That on the day of, 19.., the plaintiff was with due care traveling in a carriage drawn by two horses, all of which were his own property and of the value of dollars, along a certain highway in the town [*or city*] of known as street [*or extending from to*] which highway [*or street*] crosses the track of said railroad at a point [*describe point of crossing with certainty*], and as the plaintiff had reached said crossing the defendant negligently caused one of its locomotives, with a train of cars attached, to approach and rapidly pass the said crossing at a high and negligent rate of speed without sounding the whistle or ringing the bell, or otherwise notifying the plaintiff of the approach of said locomotive and train.

III. That the said track is so negligently constructed at said crossing that by reason of a sharp curve and deep cut the plaintiff was unable to see the said track from the highway on which he approached it, until he was upon the said crossing, and that by reason of the negligence of the defendant, its agents and servants, in running said train at said negligent rate of speed and in omitting to give warning by sounding the whistle or ringing the bell of said locomotive, the locomotive and train ran with great force into the plaintiff's said team, instantly killing said horses, breaking the said carriage and throwing the plaintiff to the ground with such violence as to break his right leg [*state injuries received*].

IV. That thereby the plaintiff lost said horses, and said carriage, was put to great expense of care and medical attendance, suffered great pain and anguish, was hindered and delayed in attending to his business [*as a*] and permanently lamed

and crippled, so as to unfit him for carrying on said business, in all to his damage dollars.

[*Allege notice of injury, if necessary, as in Form 988.*]

1033. The same, another form (adapted from Penna. R. R. Co. v. Krick, 47 Ind. 368).

I. [*Allege corporate character and business of defendant, the existence and location of the crossing and the fact of plaintiff's approach to the same upon the highway, as in previous forms, and continue*]:

II. That the defendant carelessly and negligently caused one of its locomotives, with a train of cars thereto attached, to approach said crossing from the west side thereof, and then and there to pass rapidly over the track of said railway, and negligently and carelessly omitted, while so approaching said crossing, to give any signal, by ringing the bell or sounding the steam whistle of said locomotive of the approach of said locomotive and cars, until the plaintiff was in the immediate vicinity and within twenty feet of said track, and wholly unable to check his said team and avoid a collision with said locomotive and train; that the plaintiff could not see said train, nor the track of said railway west of said crossing while he was approaching the same on account of buildings and hoop-poles and other material piled on the grounds of said railway with the knowledge and permission of defendant, on the west side of said crossing; and that by reason of the act of said defendant in causing said locomotive and train to pass over said crossing at a great rate of speed and without signals as aforesaid, the said locomotive and cars struck the plaintiff's carriage and horses [*allege injuries received and damages*]; that the said injuries were not caused by the want of ordinary care or diligence on the part of the plaintiff.

[*Allege notice, if necessary, as in Form 988.*]

1034. By passenger in street car against railway company whose engine negligently collided with street car.

I. [*As in Form 1013.*]

II. That the defendant's said railway track crosses a public street in the city of known as street, upon which street there is and was at the times hereinafter mentioned a street railway operated by trolley cars, and that said defendant's track and said street railway track cross each other at grade at said crossing.

III. That on the day of, 19.., at about the hour of o'clock p. m. the plaintiff was riding as a passenger

upon one of said trolley cars upon said street railway track, and that as said trolley car was crossing the track of said defendant company the said trolley car was run into and demolished by a locomotive operated by defendant's servants upon its said track.

IV. That the said collision between said locomotive and said trolley was caused wholly by the carelessness and negligence of the defendant and its servants in this, that the said defendant and its servants operating said locomotive gave no warning either by the blowing of a whistle or the ringing of a bell, of its approach to said crossing, and kept no lookout nor headlight upon the front of said locomotive while approaching said crossing, and caused the said locomotive to approach and pass said crossing at a negligent and unlawful rate of speed, to-wit, at the rate of miles per hour; and that solely in consequence of said various acts of negligence on the part of the defendant and its servants said trolley car was derailed and destroyed, and this plaintiff was severely injured, and his leg broken, [*allege injuries according to the fact, and resulting damage*].

[*Allege notice of injury, if required, as in Form 988.*]

1035. By passenger against street railway company, for injuries from premature starting of car.

I. That at the times hereinafter mentioned the defendant was and still is a corporation organized and existing under and by virtue of the laws of the State of and was and still is operating street cars propelled by electricity [*or horses*] upon certain streets in the city of for the carriage of passengers for hire.

II. That on the day of, 19.., the plaintiff entered one of the cars of said company and became a passenger on said railroad, to be carried safely from the intersection of and streets to street on said road, and paid his fare to the conductor of said car.

III. That upon reaching said street, the plaintiff notified the conductor of said car of his desire to alight, and thereupon said conductor did stop said car, as requested, and while plaintiff was in the act of leaving the same, and without negligence on her part, said defendant, by its servant, the motorman upon said car, did so negligently and unskillfully control and manage said car and the machinery thereof, that said car was suddenly and violently, and without notice or warning to plaintiff, started forward and along the track of said railroad, thereby violently throwing the plaintiff to the ground and [*allege injuries and damage*].

[*Allege notice, if required, as in Form 988.*]

1036. The same, another form (adapted from Hardy v. Milwaukee Street Railway Co., 89 Wis. 183).

I. [*As in last preceding form.*]

II. That on the day of, 19.., the plaintiff entered one of the cars of defendant at the corner of street and street in said city, paid her fare, and was carried as a passenger from the said point of embarkation to the point where she desired to alight from said car; and that said car was in charge of a motorman on the front platform thereof and a conductor who collected fares and gave signals for the stopping and starting of said car, and whose duty it was to assist passengers on and off said car.

III. That when the plaintiff desired to alight from said car she gave the usual signal to the conductor, who transmitted the same to the motorman, and the said car was stopped by said motorman, and the plaintiff went to the rear end of said car to alight, and that while she was upon the platform of said car, and was about to step from the last step thereof to the ground, the said conductor and motorman caused said car to be suddenly started at a rapid rate of speed, by means whereof and without fault upon her part the plaintiff was violently thrown upon the ground and [*state injuries and damages*].

[*Allege giving of notice, if necessary, as in Form 988.*]

1037. By passenger against street railway company, for injuries resulting from defective insulation (adapted from Burt v. Douglas Co. Street Ry., 83 Wis. 229).

I. [*As in Form 1035.*]

II. That on the day of, 19.., the said defendant, for the purpose of carrying passengers as aforesaid, ran upon its said track two cars attached together so that persons could pass from one car to the other by taking hold of iron railings attached to the platforms of said cars, and by stepping from the step of one car to the step of the other while the said cars were in motion. That on said day it was exceedingly cold, and said defendant had, previous to said day, been in the habit of heating its said cars for the comfort of passengers, and had held out to the public that said cars would be so warmed.

III. That on said last mentioned day, at about the hour of o'clock in the evening, this plaintiff entered as a passenger upon a train composed of two of defendant's cars running upon street in said city, which cars were attached together as aforesaid, and first went into the front car of said train and found that the same was cold and had no fire therein; that the

plaintiff thereupon attempted to pass from said first car to the second car in the manner aforesaid, and as people had been accustomed and allowed to do for a long time previously; and that while he was so passing, and necessarily had hold of the iron railing aforesaid, the said defendant, negligently and carelessly allowed a dangerous and powerful current of electricity to pass down said iron railings and through the plaintiff's hands and body, whereby the plaintiff was paralyzed and unable to release his hold from said railing, and was dragged along between said cars and when the current of electricity was shut off was dropped between said cars and thereby greatly injured [*state injuries and damage*].

[*Allege giving of notice, if necessary, as in Form 988.*]

1038. By administrator, for death of person killed by collision with street car (adapted from Thoresen, Adm. v. La Crosse City Ry. Co., 94 Wis. 129).

I. [*As in Form 1035.*]

II. That on the day of, 19.., at about the hour of o'clock in the evening the plaintiff's intestate, the said L.... M.... was traveling in a wagon drawn by one horse, in a public highway of said city known as street, upon which the defendant operates one line of its said railroad, and was crossing street in said city; and that as said L.... M.... was crossing the track of said defendant company at the intersection of said streets the defendant negligently caused one of its cars to approach and rapidly pass the said crossing, and carelessly omitted to ring the bell of said car, or otherwise warn the said L.... M.... of the approach of said car, or to stop at said crossing and permit the horse and wagon of and driven by said L.... M.... to safely pass the same.

III. That the said L.... M...., in the exercise of due care, was then and there crossing said street railway track riding in said wagon, when by reason of the said negligence of the defendant, its agents and servants, in running said car at a negligently rapid rate of speed and without stopping it at said street crossing, and omitting to give any warning of the approach of said car, the said car ran with great force into the wagon in which the said L.... M.... was riding, breaking the same and throwing the said L.... M.... to the ground with such violence as to fracture her skull and inflicting other injuries from which the said L.... M.... died on the day of, 19.., leaving her surviving the plaintiff, her husband.

IV. That thereafter, on the day of, 19.., such proceedings were duly had in the county court of county

that letters of administration upon the estate of said L.... M.... were duly granted to the plaintiff as sole administrator thereof, and that the plaintiff accepted said trust, and thereafter duly qualified and ever since has been and now is such administrator.

V. That the said L.... M.... at the time of her death was years of age, and in good health, and had been for years previously engaged in the business of selling milk at said city, and that the management of said business depended upon her work and efforts; that the plaintiff, her husband, was at the time hereinbefore stated, and now is, in feeble health, and unable to support himself by his own work and labor, and that said L.... M.... by her labor, and from the profits of said business contributed to the support and maintenance of the plaintiff [*state damage suffered*].

[*Allege notice, if necessary, as in Form 988.*]

1039. By administrator of a person killed by gross negligence of the motorman of an interurban street car (adapted from *Wilson v. C. V. R. R.*, 120 Wis. 636).¹¹

I. That at the times hereinafter mentioned the defendant was and still is a corporation organized and existing by virtue of the laws of the state of and engaged in operating a street railway system by electric power in the cities of and together with an electric railway line extending between the said cities, upon which it has during said times run and operated electric cars in carrying passengers between said cities.

II. That on the day of, 19.., the plaintiff's intestate, one L.... M.... was traveling along a certain highway in the town of extending from [*give terminal points of highway*] which highway crosses the said railway track of said defendant at [*locate the crossing*]; that said L.... M.... was driving in a westerly direction, riding in a cutter drawn by a team of horses, and while crossing the said railway track of the defendant on said highway, and in the exercise of due care, he was struck by one of the cars of the defendant company which was then proceeding in a southerly direction along said

¹¹ In the case on which this form is based, it is held that under a complaint charging gross negligence no recovery can be had for mere want of ordinary care; in a subsequent case (*Rideout v.*

Winnebago Co. Traction Co., 123 Wis. 297 s.c. 101 N. W. 672), it is held that the two causes of action are inconsistent and not joinable in the same complaint.

track over said crossing, and mortally injured so that he died upon the same day.

III. That the said car of the defendant which struck the said L.... M.... was at said time in the care and management of a motorman and conductor, servants of said defendant, and that the said motorman and conductor in the operation of said car ran at a high rate of speed, to-wit, at the rate of more than 25 miles per hour, at the time the same was passing over said crossing, and failed and omitted to give any warning of the approach of said car; that the said servants of said defendant, before the said car reached said crossing, discovered the fact that said deceased was about to cross the same and was in great and imminent peril of being injured, and that the said servants had ample time to stop said car before reaching said crossing and striking the plaintiff's intestate, but that they and each of them made no attempt to stop said car but wantonly and willfully ran the said car at said high rate of speed onto and against said deceased with a gross and utter disregard of human life.

IV. [*Allege appointment of administrator, and damages, as in last preceding form.*]

[*Allege notice, if necessary, as in following form.*]

1040. By infant, for injuries from being negligently run over by a street car.

I. That the plaintiff is an infant under the age of twenty-one years, to-wit, of the age of years, and that on the day of, 19.., on the application duly made A.... B.... was, by order of J.... K.... judge of the court of county duly appointed the guardian *ad litem* of this plaintiff, for the purposes of this action.

II. [*Allege incorporation and business of plaintiff as in Form 1013.*]

III. That on the day of, 19.., a certain car of the defendant, propelled by electricity, was by its servants being driven upon street in said city in a southerly direction when the said infant plaintiff was lawfully passing said street in a westerly direction at a point [*locate the point*]; that the defendant, by its said servants, so negligently and carelessly propelled and conducted said street car that the same was driven with great force against and over said infant plaintiff, cutting off his left arm, and otherwise seriously and permanently injuring him.

IV. That in addition to the negligence hereinbefore mentioned, the defendant carelessly and negligently permitted said street car to become and remain out of repair, in that the brakes

thereon had become weakened and unserviceable, so that they would not stop said car with reasonable certainty or celerity, or within a reasonable distance, yet that the defendant carelessly and negligently operated the same while said brakes were so defective and unserviceable, and its said servants so negligently conducted and operated said unsafe and unserviceable car, by reason whereof the same was driven against said infant plaintiff as aforesaid, causing the loss of his said arm, to his damage in the sum of dollars.

[*Allege notice if necessary, as in Form 988.*]

1041. Against railroad company, for negligently killing cattle; general form.

I. [*As in Form 1013.*]

II. That on the day of 19.., the plaintiff was the owner and possessed of certain cattle, to-wit [*designating them*] of the value of dollars, and which cows and oxen casually and without the fault of the said plaintiff, strayed in and upon the track and ground occupied by the railroad of the said defendant at [*describe or locate place with certainty*].

III. That the said defendants, by their agents and servants, not regarding their duty in that respect, so carelessly and negligently ran and managed a certain locomotive and cars, which they were then and there operating over the said railroad track at a high and dangerous rate of speed, that the same ran against and over the said cows and oxen of the said plaintiff, and killed and destroyed the same, to the damage of the plaintiff dollars.

[*Allege notice, if necessary, as in following form.*]

1042. Against railroad company for killing stock, where road is not fenced, as required by law.¹²

I. That the defendant was at the times hereinafter mentioned, and still is, a railroad corporation organized under the laws of the state of operating a railroad through the said county of and had been operating the said railroad continuously since about the day of, 19.., and

¹² The statutes of the various states differ considerably in their requirements as to fencing and the steps necessary to fix liability for killing of animals by reason of failure to build or maintain fences. When a certain time is given in which to build a fence the complaint should show that

the time has expired. Wis. Stats. 1898 secs. 1810, 1816b; Laws of Wis. 1899 c. 307; Minn. Rev. Laws 1905 secs. 1997, 1998; Iowa Code sec. 2055; N. Dak. Rev. Codes secs. 2980-2982; S. Dak. Rev. Civ. C. secs. 542-544; S. Dak. Rev. Code C. P. secs. 748-750; Cobbe's Ann. Stats. of Nebr. sec. 10021.

for more than months prior to the day of, 19.. [*the day of the accident*].

II. That on the day of, 19.., three cows [*or otherwise describe stock killed*], the property of the plaintiff, of the value of dollars, strayed upon the track and right of way of the defendant at a point about miles north of the city of in said county and state [*describe place with certainty*], and were then and there negligently run over and killed by a locomotive and train of the defendant then being operated at a high and dangerous rate of speed over said road by the defendant.

III. That the said defendant for the space of six months prior to the said day of, 19.., had failed to fence its said track and right of way at the point aforesaid [*or had failed to maintain and keep in repair the fence along its said track and right of way*], and that the said cattle were so run over and killed in consequence of the said failure to fence [*or to keep in repair the fence along*] its said right of way at the point aforesaid, and the said negligent operation of the said locomotive and train.

[*Allege service of notice of injury, as may be required by the particular statute, as for instance in Wisconsin. See Wis. Stats. 1898 sec. 1816b as amended by Laws 1899 c. 307*]:

IV. That on the day of 19.., and within one year from the happening of said accident the plaintiff caused to be served upon the said defendant a notice in writing signed by the plaintiff, stating the time and place where such damage occurred, and that satisfaction is claimed of such corporation, a copy of which notice so served is attached hereto and marked "Exhibit A." [*See Form 46.*]

[*Demand for judgment. If in Minnesota, demand double costs. Minn. Rev. Laws 1905 sec. 1998.*]

1043. The same; Iowa and Nebraska.

I and II. [*As in last preceding form.*]

III. That the point where the said cattle were so negligently run over and killed was a point on defendant's said railway where the defendant [*in Iowa say: had a right to fence the same*], [*in Nebraska say: was required by law to fence the same but had not done so*], and that said cattle were killed as aforesaid by reason of the defendant's said failure to fence said railway, and by the said negligent operation of said railway and train.

IV. [*If double damages are claimed, under Iowa Code sec. 2055; Cobby's Ann. Stats. of Nebr. sec. 121*]: That on the

.... day of, 19.. [*more than thirty days before suit is brought*] plaintiff caused a written notice, accompanied with an affidavit of said killing of said cattle to be served on L.... M.... the station [*or ticket*] agent employed in the management of the business of the defendant at in said county. Copies of said notice and affidavit are hereto annexed and made a part of this complaint, marked exhibits "A" and "B" respectively [*see Form 50, supra*]. That said defendant has neglected and refused to pay the value of said cattle.

[*Demand for double damages.*]

1044. Against railroad company for negligently setting fire.¹³

I. [*As in Form 1042.*]

II. That on the day of, 19.., the plaintiff was the owner [*or lessee*] and in possession of those certain premises described as [*insert description*] which premises immediately adjoin the lands and right of way of the defendant, and that there were on said premises at said time stacks of hay and a frame barn containing bushels of oats [*describe property burned*] all of which were the property of the plaintiff, and were of the value of dollars.

III. That defendant, on and prior to said day of, 19.., negligently permitted dry grass, and other combustible material to accumulate and remain along its said right of way adjacent to plaintiff's said premises, and that on said last named day the defendant's servants, while running one of its trains on said road, past plaintiff's said premises, negligently and carelessly managed said train, and failed to employ suitable appliances to prevent the escape of sparks and fire from the engine thereof, and negligently and carelessly allowed burning coals and fire to be thrown or dropped from said engine so that the same set fire to the said dry grass and other material so upon its right of way, and negligently and carelessly suffered said fire to escape from its right of way, and to spread upon plaintiff's said premises, whereby plaintiff's said barn and property aforesaid were burned and destroyed, to plaintiff's damage dollars.

[*Allege service of notice, if required, as in the forms immediately preceding.*]

¹³ Under various statutes, when it is shown that a fire was kindled by sparks from the engine of a railway company, there is a presumption raised that it was the

result of negligence. Minn. Rev. Laws 1905 sec. 2041; Iowa Code sec. 2056; N. Dak. Rev. Codes secs. 2983-2984.

1045. By servant against employer for injuries from defective or dangerous machinery; general form.

I. That at the times hereinafter named the defendant was and still is [a corporation organized and existing under the laws of the state of and was] engaged in the business of manufacturing [*or otherwise state the business*] at in said county of [*If action is brought against a firm, allege partnership as in Form 563.*]

II. That on or about the day of, 19.., the plaintiff was employed by the defendant as a workman in defendant's factory at said and was required to operate a certain dangerous machine in said factory, with rapidly revolving and unguarded gearing, called a planer [*or otherwise describe machinery*], and that plaintiff thereupon commenced to operate said machine and continued so to do until he received the injuries hereinafter described.

III. That it was the duty of the defendant to provide a safe and suitable machine for plaintiff's use as such employee, and to keep the same in proper repair, but that the said defendant on the contrary provided a machine which was defective and unsafe in this, that [*describe defect*] [*or if defect was the result of failure to repair: but that said defendant, on the contrary, negligently allowed said machine to become defective, unsafe and out of order in this, state defect*], all of which facts were known to the defendant but unknown to the plaintiff.

IV. That on the day of, 19.., while the plaintiff was engaged in the operation of said machine, in the performance of his duty and in the exercise of due care, and wholly on account of the defendant's said negligence, his right hand was caught in said defective and unguarded gearing [*or otherwise state the accident, according to the fact*], and was severed from the wrist [*allege other injuries received and damage*].

[*Allege notice, if necessary, before action, as in Form 988.*]

1046. The same, by infant, or other person inexperienced in the use of tools, and who received no warning.

I. [*Allege infancy of plaintiff, and appointment of guardian ad litem, in case plaintiff is an infant, as in Form 554.*]

II and III. [*Follow I and II of last preceding form.*]

IV. That at the time of plaintiff's said employment he was [an infant] of the age of years, and was entirely inexperienced in the use of machinery of any kind and ignorant of the dangers surrounding the use of said machine, which facts were well known to the defendant, and that it was the duty of the defendant to instruct the plaintiff as to the proper manner

of operating said machine and warn him of the danger incident to such operation, but that the defendant, on the contrary, negligently set the plaintiff at work upon said machine without warning or instruction, and without explanation of the danger to an unskilled workman necessarily resulting from the management and operation of said machine.

V. [*As in allegation IV of last preceding form.*]

[*Allege notice, if necessary, before action, as in Form 988.*]

1047. The same, machine defective and place unsafe.¹⁴

I. [*If plaintiff is an infant, allege infancy and appointment of guardian ad litem, as in Form 554.*]

II. [*Allege defendant's business, etc., as in allegation I of Form 1045.*]

III. That in the month of, 19 . . . , the plaintiff was employed by defendant as a common laborer to do work in and about said factory, and that defendant had no experience in the use of machinery and was ignorant of the dangers incident thereto, which fact the defendant well knew.

IV. That notwithstanding the plaintiff's said ignorance and inexperience, the defendant on the day of, 19 . . . , negligently set the plaintiff at work to oil certain rapidly revolving gearing and bearings in said mill while in motion [*or state the work according to the fact*] without giving the plaintiff any warning or explanation of the dangers of said work or informing the plaintiff that the same was dangerous.

V. That the said work was dangerous in this, that upon the said shaft so revolving there was, to the knowledge of defendant, a set screw projecting therefrom to the distance of an inch, which screw was entirely unguarded, and owing to the rapidity with which it revolved and the insufficiency of the light at that point was not discernible to the plaintiff in the performance of his duties. That said screw was so located that when the plaintiff was performing his duty of oiling the said shaft as aforesaid, his arm and sleeve necessarily came in close and dangerous proximity to the same, all of which facts the defendant well knew, but the plaintiff had no knowledge thereof.

VI. That on the day of, 19 . . . , while the plaintiff was performing, with due care, his said duty of oiling said bearing and shaft in motion, and solely in consequence of the

¹⁴ For cases involving this principle, see *Wolski v. Knapp-Stout Co.*, 90 Wis. 178; *Thompson v. Johnston Bros. Co.*, 86 Wis. 576; *Guinard v. Knapp-Stout Co.*, 90

Wis. 123; *Kucera v. Merrill L. Co.*, 91 Wis. 637; *Klatt v. Foster Lumber Co.*, 92 Wis. 622; *Kutchera v. Goodwillie*, 93 Wis. 448.

negligence aforesaid of the defendant in failing to warn the plaintiff and in allowing said set screw to remain unguarded, the sleeve of the plaintiff's blouse was caught by said set screw and his hand and arm were wound around said shaft and crushed, [*state injuries fully, and allege damage*].

[*Allege notice, if necessary, to be served, as in Form 988.*]

1048. By employee against employer for injuries from defective scaffold (adapted from Cadden v. Am. Steel B. Co., 88 Wis. 409).

I. [*As in I of Form 1045.*]

II. That on or about the day of, 19.., the plaintiff was employed by defendant as a riveter in the defendant's said factory, and that on the day of, 19.., it became the duty of plaintiff in the course of his said employment to go upon, and he did go upon an elevated scaffold or platform adjoining a certain steel barge then being constructed by the defendant for the purpose of riveting bolts upon said barge.

III. That it was defendant's duty to furnish to plaintiff a safe and secure platform or scaffold for the performance of his said work, but that the defendant on the contrary ordered and permitted two certain persons who were incompetent and unfit to construct such a scaffold and known to be so incompetent by the defendant, to erect and put said scaffold in position, and that the said defendant and its employees carelessly and negligently constructed and erected an unsafe, defective and dangerous scaffold, of all of which facts the plaintiff was ignorant.

IV. That the defendant failed to warn the plaintiff of the unsafe condition of said scaffold, and that solely by reason of the said dangerous and defective condition thereof the same tipped and fell while the plaintiff was upon the same in the performance of his said duties, on the day of, 19.., and the plaintiff was precipitated twenty feet to the earth, breaking his leg [*state injuries and damage*].

[*Allege notice, if necessary, as in Form 988.*]

1049. By employee against employer for injuries by obvious defects in machinery which defendant has promised to repair.

I and II. [*As in Form 1045.*]

III. That in operating said machine it was necessary for plaintiff frequently to pass and repass along a certain passageway on the east side thereof, of the width of but inches,

projecting into which passageway was a certain rapidly revolving, uncovered and unguarded shingle saw propelled by steam. That the presence of said unguarded saw, and the narrowness of said passageway, as well as the slippery condition of the floor thereof by reason of accumulations of sawdust and bark, caused the use of said passageway to be unsafe and dangerous, all of which was well known to the defendant.

IV. That on the day of, 19.., the plaintiff informed the defendant of the dangerous condition of said saw and passageway, and requested that the same be repaired and made safe, and the defendant then and there promised to cover said saw and make said passageway safe, and that plaintiff, relying on said promise, as he lawfully might, remained in the defendant's employment and continued to operate said machine and use said dangerous passageway for the space of hours. That defendant negligently failed to cover said saw or make safe said passageway, and in consequence of such failure and neglect by defendant, and while the plaintiff was still performing his duties in reliance upon said promise, and without fault on his part, he fell against said exposed saw, and [*state injuries received and damage*].

[*Allege notice, if necessary, as in Form 988.*]

1050. By employee against employer for injuries suffered by reason of employment of incompetent fellow-servant.

I and II. [*Allege business of defendant, and employment of plaintiff, substantially as in I and II of Form 1045, omitting statement that plaintiff was employed to work on a dangerous machine.*]

III. That it was the duty of defendant to employ skillful and competent fellow-servants for plaintiff in said factory, but that defendant negligently employed one L.... M.... as engineer to operate the steam engine and boilers in said factory, who was incompetent in this, that [*state particulars of incompetency*], and that defendant well knew the incompetency and unfitness of said L.... M.... when he employed him, but that plaintiff was at all times wholly ignorant thereof.

IV. That on or about the day of 19.., while plaintiff was performing his duties in said factory, said L.... M.... so negligently and unskillfully operated said engine and boilers, by reason of his said incompetence and unfitness, that the boiler exploded and plaintiff was thereby thrown to the floor and [*state the injuries received and damage*].

[*Allege notice, if necessary, as in Form 988.*]

1051. By minor servant against employer, for injuries received in driving dangerous horse (adapted from Craven v. Smith, 89 Wis. 119).

I. [*Allege infancy of plaintiff, and appointment of guardian ad litem, as in Form 554.*]

II. That on or about the day of, 19.., the plaintiff being then of the age of years, was employed by the defendant to perform labor upon the defendant's farm, as a common farm laborer, and that as a part of said employment, the defendant on the day of, 19.., negligently required the plaintiff to ride and manage a certain horse belonging to the defendant, attached to a certain dangerous machine known as a corn-stalker and corn-cutter, having as a part of its mechanism sharp and dangerous knives.

III. That the said horse of the defendant was vicious and unmanageable, as the defendant well knew, and that the defendant negligently failed and neglected to provide the plaintiff with any proper appliance or apparatus to manage said horse or retaining his seat thereon, and also failed and neglected to warn or inform the plaintiff of the vicious character of said horse and dangerous character of said machine, or of the precautions necessary to be used by the plaintiff in said employment, although the plaintiff was wholly ignorant as to the character of said horse, and the dangers attending the use of said machine.

IV. That while the plaintiff was so engaged in said employment, and was riding said horse with due care, the said horse became unmanageable and ran away, and the plaintiff was thrown from said horse in front of the said machine, and was severely injured [*state injuries and damage*].

[*Allege notice, if necessary, as in Form 988.*]

1052. By servant against employer for negligent exposure to infectious disease (adapted from Klugel v. Aitken, 94 Wis. 432).¹⁵

I. That on or about the day of, 19.., the plaintiff was employed by the defendant to render assistance in and about the defendant's house, and in the care of defendant's minor daughter, whom the defendant represented to the plaintiff to be ill with nervous prostration.

II. That in truth and in fact the said daughter had been

¹⁵ See Gilbert v. Hoffman, 66 Iowa, 205 s.c. 23 N. W. 632, where such an action by a guest who con-

tracted small-pox in a hotel was sustained against the proprietor.

for some time ill with typhoid fever, a dangerous and infectious disease, which fact was unknown to the plaintiff, but well known to the defendant at the time aforesaid and the defendant negligently and falsely represented and stated to the plaintiff that his daughter's illness was nervous prostration for the purpose of inducing plaintiff to enter his service.

III. That at the time of entering said service the plaintiff was ignorant as to the appearance and effects of diseases, and particularly as to the appearance and effect of typhoid fever, and was unable to discern for herself the true nature of the illness of defendant's daughter, all of which was then well known to the defendant and that the plaintiff by reason of her said ignorance, relied upon defendant's representations as to the character of her said daughter's disease, and so relying, entered the service of the defendant as aforesaid.

IV. That while the plaintiff was in such service, without negligence upon her part, and on or about the day of, 19.., she, the plaintiff, contracted the said disease of typhoid fever from the defendant's said daughter, and became seriously and dangerously ill and was confined to her bed for weeks, and suffered great bodily pain and mental anguish [*allege injuries and damage*].

[*Allege notice of injury, if necessary, as in Form 988.*]

1053. Against one who has placed an attractive and dangerous nuisance in the street, injuring child playing thereon (adapted from *Busse v. Rogers*, 120 Wis. 443).

I. That on the day of, 19.., and for a long time prior thereto, defendant was engaged in the lumber business in the city of and maintained a lumber yard in said city, adjoining the north side of street, in said city, which street is a main traveled thoroughfare and used by both pedestrians and vehicles, at all times of the day and night.

II. That several days prior to the said day of, 19.., the defendant caused a large number of timbers to be piled within the limits of said street adjoining said lumber yard, said pile extending lengthwise of said street and being about four feet high; that defendant negligently and carelessly placed a large timber, about 14 feet long and 12 or 14 inches square, upon the top of said pile of said timbers, in such position that upon the slightest application of force said timber was liable to lose its position and fall over the edge of said pile; and that the defendant negligently and carelessly allowed said timber to remain and be in such position until the time of the in-

jury hereinafter described, knowing the position of said timber to be unsafe and dangerous.

III. That there were at all times many families living in the vicinity of said lumber yard, and that the children of said families were accustomed to pass and repass on the north side of said street and along said lumber yard, and were accustomed to play about the same, to the knowledge of the defendant.

IV. That on the said day of, 19.., while the plaintiff and other children were standing and playing upon the said pile of timber, the said timber upon the top of said pile became loosened and lost its equilibrium and fell upon the plaintiff, causing great injuries to her arm, and [*state injuries and damage*].

[*Allege notice of injury, if necessary, as in Form 988.*]

1054. Against druggist for negligently putting up a poisonous drug (adapted from Davis v. Guarnieri (Ohio), 15 N. E. 350).

I. That at the times hereinafter mentioned the defendant was engaged in the business of selling drugs and filling medical prescriptions in the city of in said state.

II. That on the day of, 19.., the plaintiff applied to the defendant to put up and sell to him cents worth of oil of sweet almonds, to be used by plaintiff as a physic, and that the defendant undertook and pretended to fill said order, but carelessly and negligently put up and delivered to the plaintiff instead of oil of sweet almonds, a certain poisonous drug known as oil of bitter almonds, and negligently failed to mark the bottle or package in any manner so as to indicate its dangerous or poisonous character.

III. That the plaintiff, believing the drug so delivered to him to be oil of sweet almonds, without fault or negligence on his part swallowed a part of the same and was thereby made violently ill and [*state injuries and damages*].

[*Allege notice, if necessary, as in Form 988.*]

1055. For negligently leaving horses unhitched in the street.

I. That on the day of, 19.., the defendant, being the owner and in possession of a certain span of horses and wagon, drove the same onto street in the city of, and carelessly and negligently left the same on said street without hitching or tying said horses in any manner and without leaving any one in charge thereof.

II. That, through the negligence of said defendant in not

securing the same, said horses ran away with said wagon, and struck and collided against the buggy of the plaintiff, in which he was riding in said street, and overturned the same and injured the plaintiff [*state injuries and damage*].

[*Allege notice, if necessary, as in Form 988.*]

1056. Against superintendent of hospital for improper treatment of a patient (sustained in Drefahl v. Connell, 85 Wis. 109).

I. That during all the time from, 19.., to, 19.., the defendant held the office of superintendent of the county hospital of the county of and that during all of that time the plaintiff was lawfully an inmate of said hospital, and was afflicted with a disease affecting his legs.

II. That during all of said time it was the duty of said defendant, as such superintendent, to furnish to the plaintiff, as such inmate, a physician of reasonable and sufficient skill and experience, and such skillful and appropriate medical treatment as the nature of the plaintiff's case demanded, to furnish the plaintiff with food of the kind best suited to his debilitated condition, to maintain proper discipline among the inmates, officers, and employees of the hospital, so that the plaintiff might receive proper food and careful and considerate treatment; that during all of said time the defendant, as such superintendent, was well and sufficiently provided with all the assistant physicians, nurses, cooks, attendants, and servants and food and medicines required for the performance of his said duties, and had full control over them; that the defendant had full control of the furnishing of supplies of every kind for said hospital, and was in every way able to perform his said duties as such officer towards the plaintiff.

III. That, disregarding his said duties, the defendant neglected to give to the plaintiff sufficient and proper medical attendance; that he failed and neglected to provide for the plaintiff sufficient or suitable food, but furnished him food of a very coarse and indigestible kind, wholly unsuitable for his condition, and frequently furnished him ill-cooked and unwholesome food, by the use of which the plaintiff became greatly debilitated and suffered great pain, which is one of the causes of the plaintiff's failure to recover his health; that the defendant wholly failed to maintain proper discipline, whereby at meal times the stronger and more active inmates would rush to the table first, and take for themselves all the best portions of the food; that the plaintiff, being lame and weak was frequently prevented from getting to the table in time to obtain proper food, but had

to be content with the leavings, which were wholly unsuited to his physical condition; that the defendant wholly failed and neglected to exercise a proper supervision over his subordinates, but suffered them to grossly neglect their respective duties towards the plaintiff, and hence the plaintiff did not have the medical treatment his condition required, and continued to suffer, and did suffer, and does still suffer, great pain, both mentally and bodily, and continues ill from said sickness; that by reason of such neglect by the defendant the disease with which the plaintiff was afflicted grew much worse; that his body was much weaker and his general health greatly injured; that he suffered great bodily pain and mental anguish; that his disease has become so seated that he can never be cured, and will remain an invalid, and will be wholly dependent upon charity for support; and that he is a man about forty years of age, and has thereby sustained damage in the sum of dollars.

WHEREFORE, etc.

1057. By tenant against landlord for leasing infected dwelling (adapted from *Minor v. Sharon*, 112 Mass. 477).

I. That on and prior to the day of, 19.., the defendant was the owner of a certain dwelling house in the city of known as No. on street, and that prior to said date a number of cases of smallpox had occurred in said dwelling and had infected the same, to the knowledge of the defendant.

II. That on the day of, 19.., the defendant leased said dwelling house to the plaintiff as a residence for himself and his family and the plaintiff with his family thereupon moved into said house; that the plaintiff was wholly ignorant of the infected and dangerous condition of said house at said time, and that the defendant negligently failed to inform the plaintiff that the said house was so infected and failed to take any precaution against the exposure of the plaintiff to said disease, and that the plaintiff by reason of residing in said infected house was made sick with said disease, and was confined to his bed for weeks, and [*state injuries and damage*].

CHAPTER LX.

COMPLAINTS IN ACTIONS FOR NUISANCE.

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| <p>1058. Complaint in action at law for abatement of nuisance from offensive trade, and to recover damages therefor.</p> <p>1059. The same, another form.</p> <p>1060. The same, with prayer for injunction.</p> <p>1061. The same, to abate a soap factory.</p> <p>1062. The same, against a continuer of a nuisance.</p> <p>1063. The same, to abate gas works.</p> <p>1064. The same, to abate a brickyard.</p> <p>1065. Allegation of nuisance from rendering establishment.</p> <p>1066. Allegation of nuisance from noise and vibration of heavy machinery.</p> <p>1067. Allegation of nuisance from operation of limekiln.</p> <p>1068. Allegation of nuisance by house of prostitution.</p> <p>1069. For diverting water from plaintiff's mill.</p> | <p>1070. For erecting a dam, causing backwater.</p> <p>1071. Against erector of a dam which is a nuisance.</p> <p>1072. The same, where the land has been transferred.</p> <p>1073. Allegation of special damage to plaintiff's land.</p> <p>1074. For obstructing a private way.</p> <p>1075. For damage from bursting of a reservoir.</p> <p>1076. For obstructing street, causing injury to private person.</p> <p>1077. Complaint in equity to enjoin nuisance caused by polluting waters of a stream, by refuse of a starch factory.</p> <p>1078. Complaint in equity by a city to enjoin erection of a building in a public street.</p> <p>1079. Complaint in equity to enjoin threatened nuisance by deposit of garbage on neighboring lands.</p> |
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The statutes of most of the states covered by this work define a nuisance and provide for the abatement thereof and the recovery of damages therefor at the suit of a private person specially injured by action at law, in which an injunction may also be obtained. Wis. Stats. 1898 sec 3180; Laws of Wis. 1903 c. 81; Minn. Rev. Laws 1905 sec. 4446; Iowa Code sec. 4302; N. Dak. Rev. Codes sec. 5920; S. Dak. Rev. Civ. C. secs. 2404, 2406; S. Dak. Rev. Code C. P. sec. 692.

This statutory remedy by action at law does not, however, abrogate the remedy in equity if the injury be irreparable, or constant, and productive of interminable litigation. Wis. Stats. 1898 sec. 3180; *Bushnell v. Robeson*, 62 Iowa, 540 s.c. 17 N. W. 888.

1058. Complaint in action at law for abatement of nuisance from offensive trade, and to recover damages therefor.

I. That the plaintiff is, and for more than years last past has been the owner of the following described premises [*describe same*] and during that time has occupied and now occupies the same as his homestead.

II. That the defendant for more than years last past has been and still is in possession of certain premises contiguous to [*or, in the immediate vicinity of*] the said premises of the plaintiff [*and about feet distant therefrom*].

III. That said defendant, on or about the day of, 19.., erected on his said premises a slaughter-house, and thereafter has * kept and slaughtered, and now keeps and slaughters, large numbers of cattle in said slaughter-house, causing noxious and offensive smells to come therefrom, tainting and corrupting the air in and about the plaintiff's premises, so as to render the dwelling-house and premises of the plaintiff unhealthy and unfit for occupation; that the offal, blood and other decaying matter thrown out and about said slaughter-house causes, and has ever since said erection of such slaughter-house caused, a nuisance greatly impairing the comfort and health of the plaintiff and his family, and has impaired the value of his said premises, and hindered him from selling the same, as he much desires to do, to his damage dollars.

IV. That the plaintiff, on the day of, 19.., requested the said defendant to remove the said slaughter-house, or to abate the said nuisance, but the defendant refused so to do.

WHEREFORE the plaintiff demands judgment that the said nuisance be removed and abated, and that the plaintiff recover of the defendant the sum of dollars, as aforesaid, as well as the costs of this action.

1059. The same, another form.

I. That the plaintiff, for years last past, has been and still is lawfully possessed of a certain dwelling-house and appurtenances situate on lot on block in the city of county of, in which dwelling-house the plaintiff then resided and still does reside with his family, and has carried on and still does carry on the business of a merchant selling dry goods and groceries, in which business the said plaintiff made large profits prior to the acts of the defendant hereinafter stated.

II. That the defendant, for years last past has been and still is possessed of a certain piece of ground near the said

dwelling-house of plaintiff, and about feet distant therefrom, and on or about the day of, 19.., erected on said piece of ground a slaughter-house, and cattle pens, and has wrongfully kept and continued the same, and on divers days during said time has slaughtered oxen, calves, sheep and hogs in said slaughter-house, and placed in and near the same large quantities of blood, garbage and offal arising from the carcasses of the animals so slaughtered, and wrongfully permitted the same to remain, thereby causing noxious and offensive smells and stench arising from said blood, garbage and offal which have penetrated and still do penetrate the dwelling-house of plaintiff and rendered and do render the same unwholesome and uninhabitable, and did and still does greatly annoy, incommode and disturb the plaintiff and his family, and greatly injure the plaintiff in his business aforesaid, so that the same has been greatly decreased, and the plaintiff has been deprived of the profits and gains thereof which he would otherwise have enjoyed; all to the plaintiff's damage in the sum of dollars.

WHEREFORE [*demand for judgment as in last preceding form.*]

1060. The same, with prayer for injunction.

[*Follow either of the preceding forms, and insert in prayer for judgment after the demand for abatement*]: and that the defendant, his agents and servants, be perpetually enjoined from keeping or maintaining the said slaughter-house, etc.

1061. The same, to abate a soap factory.

I and II. [*As in first form in this chapter.*]

III. That the defendant, on or about the day of, 19.., erected on said premises a certain boiler and other apparatus for manufacturing soap, and thereupon began and has since continued and is now engaged in the boiling of large quantities of grease, dead carcasses, offal of beasts, and other dead animal matter on said premises, whereby many unwholesome and offensive smokes, and stench have been and still are emitted, so that the air surrounding the premises of the plaintiff has been and still is filled and impregnated with the smokes, stench, and rendered offensive and unhealthful, to the great injury of the plaintiff and his family.

IV. That by reason of said smokes, and stench, entering the said dwelling-house of the plaintiff, the comfort of the plaintiff and his family, and their health, as well as the enjoy-

ment of their said home, have been and are greatly impaired, and the value of said premises diminished, and he is thereby hindered from selling said premises, which he much desires to do; and [*here state other grounds of special damage*], to the plaintiff's damage dollars.

WHEREFORE, etc. [*as in preceding forms.*]

1062. The same, against a continuer of a nuisance.

I and II. [*As in first form in this chapter.*]

III. That ever since the day of, 19.., the defendant has maintained a slaughter-house on his said premises, and has [*continue as in Form 1058 from the **].

IV. That on the day of, 19.., the plaintiff requested the defendant to remove the said slaughter-house, or to cease using it for that purpose, but he has not done so.

[*Allege damages as in preceding forms.*]

WHEREFORE, etc. [*as in preceding forms.*]

1063. The same, to abate gas works (adapted from complaint in *Bohan v. P. J. G. L. Co.*, 122 N. Y. 18 s.c. 25 N. E. 246).

[*After alleging corporate character of defendant, if necessary, and also plaintiff's and defendant's ownership of adjoining premises as in Form 1058, continue*]:

III. That about the year 19.., the defendant erected a new tank for the purpose of its gas works on its said premises, the side of which said tank stands within a few feet of plaintiff's said premises. That about the year 19.., the defendant began, and ever since has, and still does, make its gas at said works from naphtha and that said tank was and still is used to store said naphtha for purposes aforesaid. That the said naphtha is a noxious, offensive and sickening mineral substance, and destructive to the health and comfort of those required to remain in close proximity to it. That said tank was erected and is maintained in a negligent and unskillful manner, and by reason of the negligence and want of care in the construction, use, and maintenance of said tank, and the negligent and unskillful manufacture of gas from naphtha, the defendant has, since the year 19.., and still does, maintain a nuisance injurious to the comfort and enjoyment of said plaintiff, and injurious to the rental value of said premises, to plaintiff's damage dollars.

WHEREFORE, etc. [*demand for judgment as in the preceding forms.*]

1064. The same, to abate a brickyard (from complaint in Kirchgraber v. Doyd, 59 Mo. App. 59).

[*Allege ownership of adjoining lands, as in Form 1058, and continue*]:

III. That during the years 19.., and 19.., and up to the time of the commencement of this action the defendant has maintained and operated upon its said premises a large brickyard, with kilns for the burning of brick, and during said time has discharged and still does discharge from the said kilns large volumes of noxious and offensive smoke fumes and gases upon the premises of the plaintiff, which said smoke fumes, vapors and gases have destroyed and still continue to destroy the crops of grain, vegetables and fruit growing on the plaintiff's said land, and have during all of said time passed into and penetrated and still continue to pass into and penetrate the dwelling-house of the plaintiff upon said land, rendering the same unhealthy and unfit to live in, and destroying its usefulness as a residence for the plaintiff and his family, and greatly depreciating its value and salability; to the plaintiff's damage dollars.

WHEREFORE, etc. [*demand for judgment as in preceding forms.*]

1065. Allegation of nuisance from rendering establishment.

[*After alleging the ownership and proximity of the plaintiff's and defendant's premises.*]

That about the month of, 19.., the defendants erected upon their said premises a building in which since the day of 19.., they have been and are now conducting the trade or business of rendering the bodies of dead animals, rancid fat, tallow and offal and other animal substances, in great quantities; which said business has during all of said time caused and still continues to cause noisome and unhealthful odors and stenches to arise from said building, and to penetrate the plaintiff's said dwelling-house, so offensive in character as to render the occupancy of plaintiff's dwelling-house by himself and family inconvenient, annoying and unhealthy, and greatly to the injury of plaintiff's said premises.

1066. Allegation of nuisance from noise and vibration of heavy machinery.

[*After alleging the ownership and proximity of plaintiff's and defendant's premises, for which see the preceding forms.*]

That since about the day of, 19.., the defendant has carried on and still carries on in certain buildings upon

its said premises the business of manufacturing [*state what*] by the use of heavy hammers and other noisy machinery, which are used with great violence and frequency, and thereby has caused and still continues to cause vibrations of the earth to take place and sundry great noises to continue night and day, and thereby has done great damage to the said dwelling-house of said plaintiff, in the sum of dollars.

That said noises and vibrations have interfered with and still continue to interfere with the comfort of the plaintiff and his family, in the occupation of said dwelling-house, making it difficult for them to sleep, and making it uncomfortable and impossible to enjoy the ordinary use of said premises as a dwelling-house, and to pursue the ordinary occupations of life therein.

1067. Allegation of nuisance from operation of limekiln.

[*Allege ownership of adjoining premises as in preceding forms.*]

That on or about the day of, 19.., the defendant erected certain limekilns upon his said premises and near to the said dwelling-house of the plaintiff, and has operated and still continues to operate the same, and to send forth therefrom noxious and unhealthful smoke-fumes, vapors and gases, which have continuously penetrated and do still penetrate the dwelling-house of the plaintiff, whereby the enjoyment by said plaintiff and his family of the said dwelling-house has been and is interfered with and said dwelling-house rendered unhealthful and uncomfortable for habitation, and greatly depreciated in value; to his damage in the sum of dollars.

1068. Allegation of nuisance by house of prostitution.

[*Allege ownership of adjoining premises, as in preceding forms.*]

That about the month of, 19.., the defendant erected upon his said premises a building, and immediately occupied and has ever since and does now occupy the said building as a house of prostitution, and for the purpose of assignation and prostitution; and has and does therein maintain and carry on said immoral practices and maintain said house as a public resort for immoral, lewd and obscene purposes, and that defendant's said premises have been and are the resort, at all times of the night especially, of lewd, immoral, and dissolute characters, both male and female; that loud, offensive, disorderly and unseemly behavior is constantly attendant thereupon, and assails the sight and hearing of plaintiff and his family, and visitors.

That by reason of the premises the comfortable use and en-

joyment of said property of plaintiff has been and is and will be greatly interfered with and destroyed, the said property is rendered unsuitable and unsalable for residence purposes, and thereby greatly depreciated and lessened in value; to the plaintiff's damage to the amount of dollars.

1069. For diverting water from plaintiff's mill.

I. That at all the times hereinafter mentioned the plaintiff was lawfully possessed [*if not in possession: the owner in fee*], of a water-mill, called a grist-mill [*or, saw-mill, or otherwise*], situated upon brook [*naming the stream*], at [*stating location definitely, or stating name of mill*].

II. That the plaintiff then had a right to use and employ the water of said brook, and to have the same flow to and through his mill in a convenient and customary manner, according to the natural and usual flow of said brook, and without the hindrance of the defendant or any other person.

III. That on the day of, 19.., and on various days between that time and the day of, 19.., the defendant [knowing the premises, and intending to injure the plaintiff], wrongfully * dug up and removed the banks of said brook above said mill, and for days diverted the water [*or, part of the water*] thereof from running to and through said mill [*or, built a dam across said brook above said mill, and for days stopped the water thereof from running to and through said mill*].

IV. That by reason of such acts of the defendant, the plaintiff's mill, which was able, and before was used to grind bushels each day, thereafter and during the time aforesaid could only grind bushels, to the damage of the plaintiff dollars. [*Or otherwise state the damage, according to the facts.*]

WHEREFORE, etc.

1070. For erecting a dam, causing backwater.

[*As in preceding form to the *, continuing*]: erected a dam and mill upon the same stream, a little below the plaintiff's said mill, and has continued the same ever since, whereby the defendant causes a backwater that hinders a free course of said stream from the plaintiff's mill, causes the water of said creek to flow back upon the water wheels of plaintiff's mill to the depth of feet, greatly diminishing the power and capacity thereof, to the nuisance of his mill, and to the hindrance of his business, to his damage dollars [*or conclude with paragraph IV of last preceding form*].

1071. Against erector of a dam which is a nuisance.

I. That the plaintiff is, and at the times hereinafter mentioned was, the owner of the freehold of certain lands in with dwelling-house thereon, known as [*designating the premises*].

II. That in the month of, 19.., the defendant wrongfully raised a dam [*or, a pool of water*] upon his freehold, in the vicinity of the plaintiff's land, whereby * the water was flowed thereon [*or, on the plaintiff's freehold*] to the nuisance of plaintiff's said freehold, and still flows thereon, to his damage dollars.

WHEREFORE the plaintiff demands judgment that the said nuisance be abated and removed, and that the plaintiff recover of the defendant dollars damages caused thereby, and the costs of this action.

1072. The same, where the land has been transferred.

[*Insert after paragraph II in preceding form*]:

III. That on or about the day of, 19.., the defendant [*erector*] conveyed said freehold to the defendant [*continuer*] who, from that time ever since, has been in possession of said freehold and dam, and wrongfully maintains said nuisance; although, on the day of, 19.., and before this action, he was by the plaintiff requested to remove and abate the same.

1073. Allegation of special damage to plaintiff's land.

[*Conclude paragraph II in Form 1071 from the *, e. g. thus*]: whereby the plaintiff's grass, of the value of dollars, then growing on said meadow, was spoiled, and his meadow made spongy, rotten, and good for nothing; and forty lengths of plaintiff's fence, of the value of dollars, have been taken up and carried away.

1074. For obstructing a private way.

I. That the plaintiff, at the time hereinafter mentioned, was [and still is] possessed of [*here describe his premises, e. g., a meadow in the town of and county of*] and had a right of way therefrom over the adjoining land to the highway [*or, to other land of the plaintiff*] to pass and repass on foot freely at all times [*or, with horses, or, with carts, designating the use of the way according to the fact*].

II. That the defendant, on the day of, 19.., and at other times thereafter, and before this action, wrongfully obstructed said way by [building a fence across it] whereby the

plaintiff was for a long time [*or, was and still is*] prevented from enjoying said way, to his damage dollars.

[*Allege other and special damage, if any.*]

WHEREFORE, etc.

1075. For damage from bursting of a reservoir (sustained in Hoffman v. T. C. W. Co., 10 Cal. 413).

I. That on or about the day of, 19.., the plaintiff was and still is the owner of [*describe property*] situated at

II. That on or about the day of, 19.., the defendant had erected and was the owner of a reservoir situated [*describe location and its proximity to plaintiff's property*] wherein was collected a large body of water, which would otherwise have flowed away in natural channels.

III. That on or about said day of, 19.., the defendant's said reservoir by reason of some defect in its construction, insufficiency for the purpose for which it was constructed, or carelessness and mismanagement on the part of the said defendant, broke away and the water therein contained flowed down upon and over plaintiff's said lands.

IV. [*Allege damage sustained.*]

WHEREFORE, etc.

1076. For obstructing street, causing injury to private person.

I. That at and before the times hereinafter mentioned there was and ever since has been a certain public highway [*or street, if in a town or city*] called street in the city of state of

II. That the said defendant on the day of, 19.., wrongfully caused to be placed large quantities of dirt, rubbish, stones and other materials in said public highway [*or street*], thereby rendering the same dangerous for public travel.

III. That the plaintiff on the day of, 19.., was lawfully passing in and along said highway [*or street*] in a certain carriage drawn by horses, and was then and there by reason of said rubbish and material so wrongfully placed in said highway [*or street*] with great force and violence overturned, without the fault or negligence of the plaintiff and his said wagon was broken and greatly injured, and he was seriously injured in and about his person [*state bodily injuries received*] whereby he was put to great expense in curing his said injuries and repairing his said carriage, to-wit, in the sum of

dollars, and was rendered unable to attend to his usual business for the space of days, to his damage dollars.

WHEREFORE, etc. [*prayer for abatement and damages, as in previous forms.*]

1077. Complaint in equity to enjoin nuisance caused by polluting waters of a stream by refuse of a starch factory (adapted from *Middlestadt v. W. S. & P. Co.*, 93 Wis. 1).

I. That the plaintiff for years last past has been and now is the owner of a farm in county, described as follows [*insert description*] upon which are the plaintiff's home and farm buildings, and where the plaintiff with his family has at all times resided and still continues to reside.

II. That the said farm is situated on the river, about one-half mile of the boundary line thereof being the thread or center of said river, and that said river is a public navigable river running through said county, and mostly consisting of spring water, and except for the acts of the defendant herein-after named, of a clear and healthy quality and suitable for use for domestic and farm purposes.

III. That the defendant for years last past has owned and operated and still owns and operates a large manufacturing establishment upon the bank of said river several miles up stream from plaintiff's said farm, and that said defendant has continuously during said years wrongfully and negligently thrown and emptied into said river, and continues to empty therein, large quantities of slops, garbage, refuse, offal, starch, rotten potatoes and pulp, which are offensive and unhealthful; and have been and are carried down stream, polluting the waters of said river, and especially along and in front of the plaintiff's said farm, generating a poisonous scum thereon and infecting the air with offensive and noxious smells and miasma, to the great injury and detriment of the plaintiff and his family.

IV. That the plaintiff has suffered and still suffers a special and peculiar injury resulting from the said wrongful acts of the defendant in that he is now and has been during all of said time deprived of the use of the water of said river for farm and domestic purposes, and deprived from cutting ice thereon, and in that the waters of said river have been and are rendered unwholesome and poisonous, and that the air surrounding the plaintiff's said dwelling has been and is rendered unhealthful, thus reducing the value of his said farm in the sum of dollars, making his said home unfit for habitation for himself and his family, all to the great damage of the plaintiff.

V. That the said nuisance is continuous and constantly recurring, and that it will work an irreparable injury to the plaintiff and to his said farm, and will result in interminable litigation unless the plaintiff have relief in equity, and that the plaintiff has no adequate remedy at law; that the defendant threatens and gives out that he will continue to operate said factory and empty the said slops and refuse in the said river in the future in the same manner as heretofore, and that the plaintiff believes and fears that he will do so unless restrained by the injunctional order of this court.

WHEREFORE the plaintiff demands judgment that the said defendant, his agents and servants, be perpetually enjoined and restrained from emptying or throwing any of said slops or refuse matter into said river, that a temporary injunctional order issue in this cause, that the plaintiff have judgment against the defendant for his damages already suffered, to-wit, the sum of dollars, with costs, and that he have such further or other relief as may be just and equitable.

1078. Complaint in equity by a city to enjoin erection of a building in a public street (adapted from *Racine v. J. I. Case Plow Co.*, 56 Wis. 539).

I. That the plaintiff is now, and since the day of, 19..., has been a municipal corporation organized and existing under and by virtue of chapter of the laws of the state of

II. That there is now and for years last past has been a public street and highway existing in the said city known as street, ... feet in width and extending from [*describe street*] which has been and now is a public highway of great importance and largely and constantly used by teams and foot passengers for the purpose of travel and trade.

III. That on or about the day of, 19..., the defendant caused to be made an excavation about feet long and feet in width in said street [*describe location*] and to lay walls and foundations in said excavation, and is continuing to build said walls and foundations, and gives out and states that he will immediately erect thereon a permanent building of one or more stories in height whereby said street will be greatly impaired in its usefulness and the width thereof reduced to feet, and the same will be rendered less convenient for public travel and convenience.

IV. That this plaintiff has duly notified said defendant not to erect said building, but that defendant threatens to continue and complete the same, and that the plaintiff fears and believes

that he will do so, thereby causing a multiplicity of suits and working an irreparable injury to the plaintiff; that the plaintiff has no adequate remedy at law.

WHEREFORE, etc. [*prayer for perpetual injunction.*]

1079. Complaint in equity to enjoin threatened nuisance by deposit of garbage on neighboring lands.

I and II. [*As in Form 1058.*]

III. That defendant in or about the month of, 19. . . , began to deposit on his said lot, and still continues to deposit thereon large quantities of garbage, offal, manure, decayed vegetables and animal matter, and allow others to deposit such articles and material thereon, and gives out and threatens that he intends to continue to use said lot for the purpose of depositing said garbage and other material thereon.

IV. That the effect of such deposit of garbage and other material on said lot has been and in the future will continue to be to fill the air in and about the plaintiff's said dwelling house with offensive and unhealthy stench, and to endanger the plaintiff's health and that of his family, to their great annoyance and discomfort, and to the irreparable injury of the plaintiff, by rendering his house uninhabitable and greatly diminishing the value thereof.

WHEREFORE the plaintiff demands judgment: (1) that the defendant and all persons claiming or acting under him be perpetually enjoined and restrained from using or permitting the use of said lot and premises for the uses aforesaid; (2) for the costs and disbursements of this action; (3) for such other or further relief as may be equitable.

CHAPTER LXI.

COMPLAINTS IN ACTIONS FOR WASTE.

- | | |
|--|---|
| 1080. By lessor against lessee for damages. | 1086. By lessor against lessee for damages and an injunction (Wisconsin). |
| 1081. By remainderman under will against life tenant. | 1087. Complaint for waste, general form (Minnesota). |
| 1082. By ward against guardian. | 1088. Complaint for waste, general form (North and South Dakota). |
| 1083. By joint tenant or tenant in common against cotenant (Wisconsin). | 1089. Complaint for waste, general form (Iowa). |
| 1084. By heirs against dowress (Wisconsin). | 1090. Complaint for waste, general form (Nebraska). |
| 1085. By purchaser at sheriff's sale; for waste committed before conveyance. | |

[Wis. Stats. 1898 secs. 3171-3176.]

1080. By lessor against lessee for damages.

I. That the plaintiff, before and at the time of the committing of the grievances hereinafter mentioned, was and still is the owner in fee-simple of the following described lands [*description of premises*].

II. That at the time of the committing of said grievances the defendant held and enjoyed the said premises as tenant thereof to the plaintiff, under and by virtue of a demise to the defendant, made by the plaintiff for the term of years from, 19..

III. That the defendant, with intent to injure the plaintiff in his reversionary interest therein, on the day of, 19.., and on other days thereafter, and before this action, without authority, cut down and carried away therefrom one thousand beech trees, one thousand chestnut trees, etc., of the value of dollars.

IV. That during the same time he likewise dug up and carried away one thousand cubic yards of soil and herbage, of the value of dollars, and converted all the same to his own use.

V. That during the same time he likewise wrongfully [*or negligently*] set fire to and destroyed a certain building upon the premises, and constituting part of the realty, and wholly destroyed the same, which said building was of the value of

..... dollars. [State other acts of waste if any, according to the facts].

VI. That by reason of said acts of waste the value of said premises and of the plaintiff's reversionary interest therein has been greatly impaired to the damage of the plaintiff in the sum of dollars for double which sum plaintiff demands judgment against the defendant, with costs.

1081. By remainderman under will against life tenant (Wisconsin).

I. That on the day of, 19.., one E.... F.... was seized in fee-simple of [describe the premises].

II. That in his lifetime the said E.... F.... made and published his last will and testament, whereby he devised the said land to the defendant for life, and afterwards to the plaintiff in fee.

III. That on the day of, 19.., at the said E.... F.... died.

IV. That said will was afterwards and on the day of, 19.., duly admitted to probate by the court of county, being the court which had jurisdiction thereof, and on the day of, 19.., by judgment of said court the said land was duly assigned to the said defendant for life, and the remainder thereof in fee to this plaintiff.

V. That on the day of, 19.., the defendant entered into possession of said lands under said will, and has ever since been and is now in possession thereof.

VI. [Continue as in preceding form, III to VI.]

1082. By ward against guardian (Wisconsin).¹

I. That on or about the day of, 19.., the defendant was by order of the court of county duly appointed the general guardian of the estate of the plaintiff, and thereafter duly qualified and entered upon the discharge of his duties as such guardian, and continued to be such guardian until the day of, 19.. [or, and still is such guardian].

II. That the defendant during his said guardianship was in possession and control of [describe premises] which were during said time and now are owned in fee simple by plaintiff.

III. That while in possession of said premises as such guardian, and on various days between the day of, 19..,

¹ If the plaintiff be a minor when the action is brought, a guardian *ad litem* must be ap-

pointed, and such appointment must be alleged in the complaint, as in Form 554.

and the beginning of this action, the said defendant committed acts of waste upon said property, as follows [*here set forth acts of waste and demand for judgment as in preceding forms*].

1083. By joint tenant or tenant in common against cotenant (Wisconsin).

I. That the plaintiff and the defendant are seized in fee as tenants in common [*or joint tenants*] of the following described premises [*insert description*] and have been so seized since the day of, 19..

II. That on or about the day of, 19.., and at various times thereafter and prior to the commencement of this action the said defendant committed acts of waste upon said premises to the great injury of the plaintiff's estate therein, to-wit, said defendant [*here allege acts of waste as in Form 1080, or according to the facts*].

III. That by reason of the premises, the plaintiff's estate in said lands has been damaged in the sum of dollars.

WHEREFORE [*demand for judgment as in preceding forms*].

1084. By heirs against dowress (Wisconsin).

I. That one E.... F.... was in his lifetime seized in fee-simple and in possession of lands in county, of which the following described premises are a part.

II. That on the day of, 19.., being so seized, he died intestate, leaving the defendant C.... D.... his widow.

III. That the defendant C.... D.... thereafter entered on and was possessed as her dower during her life of one-third part of said lands, to-wit, the following described premises: [*description of premises*] which said premises were duly assigned to said defendant as her reasonable dower by order of the court of county entered on the day of, 19..

IV. That the plaintiffs were left by the said E.... F.... his only children and heirs; and as such were, at the time of the committing of the grievances hereinafter mentioned and still are, entitled to the reversion in the above described premises subject to said estate in dower.

V. [*Allege acts of waste and damage therefrom.*]

WHEREFORE, etc. [*as in preceding forms.*]

1085. By purchaser at sheriff's sale, for waste committed before conveyance (Wis. Stats. 1898 sec. 3016).

I. That on the day of, 19.., the premises hereinafter described were owned in fee-simple by one K.... L....,

but were subject to the lien of a judgment theretofore recovered by C.... D.... against E.... F.... and docketed in said county on the day of, 19.., and that on the day of, 19.., the sheriff of said county, by virtue of an execution issued to him upon said judgment, sold the said premises which are bounded and described as follows [*here describe the premises*].

II. That at such sale the plaintiff became the purchaser, and the sheriff executed and delivered to him a certificate of the sale, and subsequently, and on the day of, 19.., and before this action executed and delivered to the plaintiff a deed of the premises pursuant to the sale, and the plaintiff paid the purchase-money therefor.

III. That intermediate the sale and the delivery of the deed, the defendant cut and carried from the land one thousand pine-trees [*or otherwise charge the waste committed and resulting damage as in preceding forms*].

WHEREFORE, etc. [*demand for judgment*].

1086. By lessor against lessee for damages and an injunction (Wisconsin).

I. That the plaintiff, being then and ever since owner in fee-simple of the premises hereinafter mentioned, on the day of, 19.., by a lease in writing then made between the plaintiff and the defendant, under their hands and seals [*or, under the hand and seal of the defendant*], the plaintiff leased to the defendant [*designate term and premises, e. g. thus: for ten years from said date, at a yearly rent of \$1,000, a certain dwelling-house, with stable and sheds attached, and ten acres of lawn and woodland, orchard and garden, at in the county of , the property of the plaintiff*].

II. That said lease contained a covenant on the part of the defendant, of which the following is a copy [*copy of the covenant as to waste or repairs*]. [*Or: II. That the defendant in said lease covenanted that he would, stating the substance of the covenant.*]

III. That the defendant took possession of the premises under said lease, the same being then in good repair and condition; but that they have since become ruinous and bad, and the lands very much deteriorated by the wilful mismanagement and improper cultivation thereof by the defendant; that he has ploughed up the garden, destroying the shrubbery and flowers therein, and has cut down ten ornamental and shade trees standing near the house, and has cut down ten apple trees in the orchard [*or in like manner state other waste, according to the*

fact] and has otherwise suffered and committed great waste on the premises; by reason of which waste the premises are worth dollars less, to be sold, than they were when the defendant took possession thereof; and it would cost dollars to restore them.

IV. That the defendant threatens to cut down other of the ornamental shade, and fruit trees, and to remove the partitions in the first story of the house, and turn it into a workshop [*or other threatened waste*].

WHEREFORE the plaintiff asks judgment: (1) That the defendant may be required to [restore and] repair the premises; (2) that he pay to the plaintiff dollars damages done to and suffered by the premises [the plaintiff hereby waiving all forfeitures and penalties incurred in respect to said waste]; (3) that he be required to keep the same in good repair and condition during the continuance of his interest therein, and to manage and cultivate the farm in a proper and husband-like manner, according to the terms of the lease, and the custom of the country; (4) that he be enjoined from committing any further waste, and particularly from [*stating particular act to be enjoined*].

1087. Complaint for waste, general form (Minnesota).

[*In Minnesota the forms heretofore given in this chapter for use in Wisconsin may be used. The Minnesota statute, however, allows judgment for treble damages, also in case of waste by a tenant for forfeiture of a tenant's unexpired term and eviction from the property in case the waste committed equals the value of such unexpired term or was done in malice. Minn. Rev. Laws 1905 sec. 4447. Where such relief is sought, the following additional allegations should be contained in the complaint after the allegations of waste*]:

That the injury thereby done to the said property is the sum of dollars and [more than] equal to the value of the defendant's unexpired term.

That said waste was committed in malice.

WHEREFORE the plaintiff demands judgment: (1) That the estate of the defendant in the said property be forfeited; (2) that he be evicted therefrom; (3) for dollars damages, and for the costs of this action.

1088. Complaint for waste, general form (North and South Dakota).

[*In North and South Dakota treble damages are given for waste, and forfeiture and eviction may be awarded if the waste*

committed be equal in value to the tenant's estate or if it be done in malice. N. Dak. Rev. Codes secs. 5921-5922. S. Dak. Rev. Code C. P. secs. 693-694. The forms heretofore given for use in Wisconsin may be used, adding thereto the additional allegations given in Form 1087 for use in Minnesota.]

1089. Complaint for waste, general form (Iowa).

[In Iowa the forms heretofore given in this chapter for use in Wisconsin may generally be used. Judgment should be demanded, however, for treble damages. Iowa Code sec. 4303. Judgment of forfeiture and eviction may also be rendered when the damages found are more than two-thirds of the value of the interest of the defendant in the premises. Id. sec. 4304. In case forfeiture and eviction are desired the petition should contain, after the allegations of waste, the following allegation]:

That the injury thereby done to the said property is the sum of dollars, and more than two-thirds the value of the interest possessed by the defendant in said property.

WHEREFORE the plaintiff demands judgment that the estate of the defendant in said premises be forfeited, and that he be evicted therefrom, and that the plaintiff recover dollars damages and costs.

1090. Complaint for waste, general form (Nebraska).

[In Nebraska treble damages are given and judgment of forfeiture and eviction may be had when the waste exceeds two-thirds the value of defendant's interest in the property. Cobbey's Ann. Stats. of Nebr. secs. 1645, 1649. The forms given for use in Wisconsin may be used with the additional allegation given in Form 1089 for use in Iowa.]

CHAPTER LXII.

COMPLAINTS FOR TRESPASS TO REAL PROPERTY.

- | | |
|---|--|
| 1091. For single act of trespass. | and injuring personal property therein. |
| 1092. The same, for cutting and converting timber. | 1096. For cutting and removing timber (Wisconsin). |
| 1093. The same, for removing fence. | 1097. For treble damages for willful injuries to trees. |
| 1094. For various repeated acts of trespass. | 1098. For treble damages for forcible entry or detainer. |
| 1095. For entering plaintiff's house, defacing the same | |

1091. For single act of trespass.

I. That on the day of, 19.., the plaintiff was the owner and in possession of the following described lands [*insert description*].

II. That on said last named day the defendant unlawfully broke and entered upon said lands and depastured the same with his cattle, to the plaintiff's damage dollars.

WHEREFORE, etc.

1092. The same, for cutting and converting timber.

I. That on the day of, 19.., the plaintiff was the owner and in possession of the following described lands [*insert description*].

II. That on said last named day the defendant unlawfully broke and entered upon said lands and there cut down and carried away the trees and timber of this plaintiff, and converted and disposed of the same to his own use, to plaintiff's damage dollars.

WHEREFORE, etc.

1093. The same, for removing fence.

I. That on the day of, 19.., the plaintiff was the owner and in possession of the following described lands [*insert description*].

II. That on said last named day the defendant unlawfully broke and entered upon said lands, took down a fence standing

upon said land of the plaintiff, and removed the same, and also then and there erected another fence on said land, and also then and there disturbed the plaintiff in the use and occupation of said land, and prevented him from enjoying the same as he otherwise would have done, to his damage dollars.

WHEREFORE, etc.

1094. For various repeated acts of trespass.

I. [*As in Form 1091.*]

II. That on said last named day and at various times between said date and the day of, 19.., the defendant unlawfully broke and entered upon said lands, and with feet in walking trod down and ruined the grass and grain of the plaintiff growing thereon, to the plaintiff's damage dollars.

[*Or: with his cattle depastured the grass and grain of the plaintiff then and there growing and of the value of dollars.*]

[*Or: with horses and wagons and other vehicles crushed and spoiled the grass and grain then and there growing, and of the value of dollars.*]

[*Or: unlawfully cut down and carried away the grass, hay and grain of the plaintiff, then and there growing, of the value of dollars, and carried the same away and converted the same to his own use, to the damage of the plaintiff dollars.*]

WHEREFORE, etc.

1095. For entering plaintiff's house, defacing the same and injuring personal property therein.

I. That on the day of, 19.., the plaintiff was the owner and in possession of that certain dwelling-house in the of, in said county known as No., ... street [*or situated upon Lot Block, or otherwise describe the house*] with the furniture and other personal property therein.

II. That on the said day of, 19.., the defendant forcibly broke and entered [*or where the entry was without force, wrongfully entered*] the said dwelling-house of the plaintiff, and broke and injured the walls and doors thereof [*or other injury, according to the fact*], and took and carried away a table and six chairs, the property of the plaintiff, of the value of dollars, and converted and disposed of said goods to his own use [*or: cut, broke, and injured, etc., describing the*

property injured] to the damage of the plaintiff dollars.

WHEREFORE, etc.

1096. For cutting and removing timber (Wis. Stats. 1898 sec. 4269; Laws of Wis. 1901 c. 170).

I. That on the day of, 19.., the plaintiff was and ever since has been the owner and in possession of the following described lands and premises, to-wit [*describe same*].

II. That the defendant, on said day and divers other days between that day and the commencement of this action, did unlawfully and without authority, break and enter upon the premises aforesaid, and cut and remove therefrom thousand pine trees, of the value of dollars, and converted the said trees and the logs cut therefrom to his own use, by manufacturing the same into boards, planks, joists, studding, scantling and shingles, which while in the possession of said defendant were of the value of dollars [*state value at highest market at any time since trespass*], to the plaintiff's damage dollars, for which sum, and the costs of this action, he demands judgment.

1097. For treble damages for willful injuries to trees (Minn. Rev. Laws 1905 sec. 4449; Iowa Code sec. 4306; N. Dak. Rev. Codes sec. 5008; S. Dak. Rev. Civ. C. sec. 2323; Cobbeys' Ann. Stats. of Nebr. sec. 1648).

I. [*Allege title and possession as in last preceding form.*]

II. That the defendant, in the month of, 19.., and at various other times between that time and the commencement of this action, entered upon the said land of the plaintiff, and did, without the leave of the plaintiff, willfully and wrongfully cut down [*or, carry off, or, cut down and carry off*] 300 pine trees and 100 oak trees [*or otherwise describe the wood, under-wood, trees, or timber*] of the value of dollars; and girdled [*or otherwise injured, describing the injury*] other trees [*designating number and kind*] of the value of dollars; whereby the plaintiff lost said trees and timber, and the land belonging to the plaintiff was greatly damaged and lessened in value, to the amount of dollars; and thereby the defendant, by the force of section [*here insert chapter and section of the statute applicable*] forfeited and became liable to pay to the plaintiff treble the amount of said damages.

WHEREFORE the plaintiff demands judgment against the defendant for treble the amount of his damages as aforesaid, and for the costs of this action.

1098. For treble damages for forcible entry or detainer (Minn. Rev. Laws 1905 secs. 4451, 4452; Bagley v. Sternbery, 34 Minn. 470 s.c. 26 N. W. 602; N. Dak. Rev. Codes sec. 5007; S. Dak. Rev. Civ. C. sec. 2322; Olson v. Huntamer, 6 S. Dak. 364 s.c. 61 N. W. 479).

I. That at the time hereinafter mentioned, the plaintiff was rightfully and peaceably in possession of a certain farm and dwelling-house, barns, and sheds thereon, described as follows [*insert description*].

II. That on the day of, 19.., the defendant forcibly entered thereon, and in a forcible manner and without lawful authority disseized the plaintiff and ejected and put him out of said lands and tenements, and by force and with a strong hand kept him out therefrom, to his damage dollars; whereby the defendant, by force of section [*insert chapter and section of the statute applicable*] forfeited and became liable to pay treble the amount of said damages.

WHEREFORE, etc. [*demand for judgment as in the last preceding form.*]

CHAPTER LXIII.

COMPLAINTS IN EJECTMENT.

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|---|--|
| 1099. Complaint in ejectment, general form; nominal damages only (Wisconsin). | 1107. The same, by administrator (Wisconsin). |
| 1100. The same, claiming damage for mesne profits, and for waste (Wisconsin). | 1108. Petition in ejectment, general form, nominal damages (Iowa). |
| 1101. The same, for estate dower (Wisconsin). | 1109. The same in action against cotenant (Iowa). |
| 1102. Complaint in ejectment, general form, no damages (Minnesota). | 1110. The same, with claim for mesne profits (Iowa). |
| 1103. The same, with claim for mesne profits and waste (Minnesota). | 1111. Complaint in ejectment (North and South Dakota). |
| 1104. The same, where both parties claim title from common source. | 1112. Petition in ejectment without damages (Nebraska). |
| 1105. The same, alleging title by devise. | 1113. The same, with claim for mesne profits (Nebraska). |
| 1106. The same, alleging title by descent. | 1114. The same, by tenant in common against cotenant (Nebraska). |

The term ejectment is used in the title of this chapter simply for convenience. The common law action of ejectment was abolished by the code, and it is not used in the statutes of the code states generally, although in Wisconsin it is again used to designate the action to recover the possession of real estate. In the other states covered by this work it is included within the general class of actions denominated generally actions concerning or relating to real property, except in Iowa, where it is denominated an action for the recovery of real property. Wis. Stats. 1898 Chap. 133; Laws of Wis. 1901 sec. 152; Minn. Rev. Laws 1905 sec. 4424 *et seq.*; Iowa Code sec. 4182 *et seq.*; N. Dak. Rev. Codes sec. 5904 *et seq.*; S. Dak. Rev. Codes C. P. sec. 675 *et seq.*; Cobbeys' Ann. Stats. of Nebr. sec. 1638 *et seq.*

1099. Complaint in ejectment, general form, nominal damages only (Wis. Stats. 1898 sec. 3077).

I. That the plaintiff has an estate in fee simple [*or, for the life of him the plaintiff, or, for years from , 19 . . . , specifying the life or the length of the term*] in the following de-

scribed real estate [*here insert an accurate description of the premises claimed, designating the number of the lot or township, if any, in which they are situated; if none, stating the names of the last occupants of lands adjoining the same, if any, or by metes and bounds, or in some other way so that from the description given possession of the premises claimed may be delivered.*]

II. That the plaintiff is entitled to the possession of said premises, and that the defendant unlawfully withholds the possession thereof from him, to his damage in the sum of six cents.

WHEREFORE the plaintiff demands judgment against the defendant for the possession of said premises and for six cents damages and for the costs and disbursements of this action.

1100. The same, claiming damage for mesne profits and for waste (Wis. Stats. 1898 sec. 3082).

I. [*As in last preceding form.*]

II. That the plaintiff is entitled to the possession of said premises, and that the defendant unlawfully withholds possession thereof from the plaintiff, and has so unlawfully withheld possession thereof since the day of, 19.., to the plaintiff's damage dollars.

III. That, while so unlawfully in possession, said defendant has committed waste thereon, by removing buildings and parts of buildings therefrom, by cutting down, and disposing of much valuable timber and trees thereon, by quarrying and carrying away therefrom large quantities of valuable building stone [*or otherwise state the waste complained of*] and by the said acts of waste said defendant has permanently injured and impaired the value of said premises, and the plaintiff's estate therein, to the plaintiff's damage in the sum of dollars.

WHEREFORE the plaintiff demands judgment against the defendant: (1) For the possession of the said premises (2) for dollars, the plaintiff's damages for the withholding thereof, and for the waste done and permitted thereon as afore-said, and for the costs and disbursements of this action.

1101. The same, for estate dower (Wis. Stats. 1898 sec. 3077).

I. That the plaintiff and one E.... F.... were lawfully married on the day of, 19.., and that the said E.... F.... died on the day of, 19.., and that the plaintiff is now the widow of the said E.... F.... deceased.

II. That at the time of his death, the said E.... F.... was seized in fee simple and in possession of the following described premises, to-wit [*here describe premises as in preceding forms*].

III. That the plaintiff, as widow of said E.... F.... owns

an estate for her life in one-third part of the above described premises, as her reasonable dower, and is entitled to the possession thereof.

IV. That the above named defendants deny the plaintiff's said dower right, and unlawfully withhold the possession of her said one-third part of said premises, from the plaintiff, to her damage dollars.

[If recovery for use and occupation, or waste, is sought, add allegations for that purpose, as in last preceding form.]

WHEREFORE *[add demand for judgment as in preceding forms.]*

1102. Complaint in ejectment, general form, no damages (Minnesota).¹

I. That the plaintiff is the owner in fee *[or is the owner of an estate for life, or, for years, as the fact is]* and entitled to the immediate possession of *[describing premises]* in the county aforesaid.

II. That defendant is now in possession thereof and unlawfully withholds the same from plaintiff.

WHEREFORE the plaintiff demands judgment for the recovery of the possession of said premises, and for the costs and disbursements of this action.

1103. The same, with claim for mesne profits and waste (Minn. Rev. Laws 1905 sec. 4432).

I. That on the day of, 19.., the plaintiff was and still is the owner in fee *[or for life, or, for years]* of the following described premises *[insert description]*.

II. That on the day aforesaid the defendant wrongfully entered into said premises and ousted the plaintiff, and still unlawfully withholds the possession thereof from him.

III. That the value of the use and occupation of said premises, from the time the defendant so took possession up to the time of the commencement of this action, is dollars.

IV. *[If recovery for damage to the freehold is sought insert the proper allegation, as in the second form in this chapter.]*²

WHEREFORE the plaintiff demands judgment: (1) For the recovery of the possession of said premises; (2) for the sum of

¹ This short form of complaint is substantially held sufficient in *Pinney v. Fridley*, 9 Minn. 34, and *Merrill v. Dearing*, 22 Minn. 376.

² A claim for permanent injuries to the estate while in defend-

ant's possession should be made in the ejectment action, as it is part of the same cause of action. *Pierre v. Ry. Co.*, 37 Minn. 314 s.c. 39 Minn. 451 s.c. 40 N. W. 520.

..... dollars, the value of the use and occupation of said premises; (3) for the further sum of dollars as damages for injuries to said premises; (4) for the costs and disbursements of this action.

1104. The same, where both parties claim title from common source (Wisconsin or Minnesota).³

I. That on the day of, 19.., one E.... F.... was the owner in fee and in possession of the following described premises [*insert description*] and that on said day the said E.... F.... duly conveyed the same in fee to the plaintiff, who is still the owner in fee and entitled to the possession thereof.

II. [*Allege withholding of possession, etc., as in preceding forms.*]

1105. The same, alleging title by devise (Wisconsin and Minnesota).

I. That on the day of, 19.., one E.... F.... was lawfully seized as owner in fee simple, and was in possession of the following described premises [*insert description*].

II. That on said day the said E.... F.... died leaving a last will duly executed, wherein he devised to plaintiff the said premises.

III. That on the day of, 19.., said will was duly proved and admitted to probate in the court in and for the county of state of

IV. That on the day of, 19.., said premises were duly assigned to plaintiff in fee by the terms of a final judgment of distribution then and there duly made by said court, and that the plaintiff is still the owner in fee and entitled to the possession of said premises.

V. [*Continue as in the appropriate preceding form.*]

1106. The same, alleging title by descent (Wisconsin or Minnesota).

I. [*As in last preceding form.*]

II. That on said day the said E.... F.... died intestate, leaving these plaintiffs his only children and heirs at law.

III. That thereafter the estate of the said E.... F.... was duly administered upon in the court in and for the

³ This method of pleading is useful because if the complaint be verified the defendant must admit

common source of title, and thus obviate necessity of proving previous title.

county of, state of, and that on the day of, 19.., by a judgment or order of final distribution, which was duly made by said court, said premises were assigned in fee to plaintiffs, who are still the owners thereof in fee simple, and entitled to the possession thereof.

IV. [*Continue as in appropriate preceding form.*]

1107. The same, by administrator (Wis. Stats. 1898 sec. 3083).

I. [*As in last two preceding forms.*]

II. That on said day the said E.... F.... died intestate, leaving G.... H.... and J.... K.... his only children and heirs at law, who then became and now are lawfully seized as owners in fee simple of the said real estate.

III. That on the day of, 19.., this plaintiff, upon proceedings duly had in and before the court of county was by said court duly appointed administrator of the estate of said E.... F...., deceased, and thereafter duly qualified and entered upon the duties of his said trust and is now such administrator, and as such entitled to the immediate possession of said real estate.

IV. That defendant is in possession of said premises and unlawfully withholds the same from the plaintiff as such administrator, to his damage dollars. [*Add claim for mesne profits, if sought to be recovered, and demand for judgment as in preceding forms.*]

1108. Petition in ejectment, general form, nominal damages (Iowa Code sec. 4187).

I. That the plaintiff is entitled to the possession of the following described premises [*insert accurate description thereof*].

II. That the plaintiff is the owner of said premises in fee simple [*or, is the owner of an estate for the life of him the said plaintiff in said premises, or otherwise state the nature and extent of plaintiff's interest*].

III. That the defendant unlawfully keeps the plaintiff out of possession of said premises, to the plaintiff's damage in the sum of six cents.

IV. That a true and correct abstract of the title of said premises is attached to and made part of this petition, and marked Exhibit A. [*Iowa Code sec. 4188.*]

WHEREFORE plaintiff demands judgment for the immediate possession of said premises, together with six cents damages and costs.

[*Attach abstract of title.*]

1109. The same in action against cotenant (Iowa Code sec. 4185).

I and II. [*As in preceding form, specifying however the particular share of the estate to which plaintiff is entitled and the nature of his tenancy, whether joint or in common.*]

III. That prior to the commencement of this action the plaintiff demanded possession of said premises from the said defendant, but that the defendant denied the plaintiff's right to the same, or any part thereof, and that the defendant unlawfully keeps the plaintiff out of possession of said premises, to the plaintiff's damage in the sum of six cents.

[*Continue as in last preceding form.*]

1110. The same, with claim for mesne profits (Iowa Code sec. 4198).

I and II. [*As in last two forms.*]

III. That the defendant unlawfully keeps the plaintiff out of possession of said premises, and has unlawfully kept the plaintiff from such use and possession since the day of, 19.., up to the time of the commencement of this action, to the plaintiff's damage in the sum of dollars.

[*Continue as in last two forms.*]

1111. Complaint in ejectment (North Dakota and South Dakota).

[*In these states the forms given previously in this chapter for use in Wisconsin and Minnesota will be found sufficient. N. Dak. Rev. Codes Chap. 30; S. Dak. Rev. Codes C. P. Chap. 29; Brady v. Krueger, 8 S. Dak. 464 s.c. 66 N. W. 1083; Lewis v. Ry. Co., 5 S. Dak. 148 s.c. 58 N. W. 580; Hegar v. De Groat, 3 N. Dak. 354 s.c. 56 N. W. 150.*]

1112. Petition in ejectment without damages (Cobbey's Ann. Stats. of Nebr. sec. 1638).

I. That said plaintiff has a legal estate in and is entitled to the possession of the following described premises, to-wit [*describe premises with certainty*], situate in county, and said defendant, ever since the day of, 19.., has unlawfully kept and still keeps the plaintiff out of the possession thereof.

WHEREFORE the plaintiff demands judgment for the delivery of the possession of said premises, and for the costs of this suit.

1113. The same, with claim for mesne profits (Nebraska).

I. [*As in last preceding form.*]

II. That the defendant, while unlawfully in possession of said premises, has received the rents and profits thereof from the day of, 19.., to the commencement of this action, amounting to the sum of dollars, and has applied the same to his own use, to the plaintiff's damage in the sum of dollars.

WHEREFORE the plaintiff demands judgment for the delivery of the possession of said premises and also for said sum of dollars for said rents and profits, and for costs of suit.

1114. The same, by tenant in common against cotenant (Nebraska).

I. That said plaintiff has a legal estate in and is entitled to the possession, as a tenant in common with the defendant, of the following described premises, to-wit [*describe premises*], situate in county.

II. That the defendant denies that the plaintiff has any estate in said premises as tenant in common or otherwise, and claims to own the entire estate, and that said defendant ever since the day of, 19.., has unlawfully kept and still keeps the plaintiff out of the possession thereof.

[*Add allegation of receipt of rents and profits and demand of judgment as in preceding forms.*]

CHAPTER LXIV.

COMPLAINTS FOR FORECLOSURE

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|---|--|
| 1115. Complaint for foreclosure of mortgage, all due, general form (Wisconsin). | 1123. For foreclosure of mortgage, general form (North and South Dakota). |
| 1116. The same, amount not all due (Wisconsin). | 1124. For foreclosure, general form (Nebraska). |
| 1117. The same, where mortgage contained covenant to insure, and option clause. | 1125. The same, where there are junior incumbrancers, and agreement to pay taxes which has been breached (Nebraska). |
| 1118. Assignee against mortgagor, mortgagee who guaranteed payment, and subsequent purchaser, who assumed the mortgage. | 1126. For foreclosure, general form (Iowa). |
| 1119. Allegation of inadequacy of security where a receiver is desired. | 1127. The same, amount not all due (Iowa). |
| 1120. By mortgagee in possession against parties entitled to redeem, seeking accounting. | 1128. For foreclosure of title bond (Iowa). |
| 1121. To have deed absolute declared a mortgage, and foreclosed. | 1129. For foreclosure of chattel mortgage, general form. |
| 1122. For foreclosure of mortgage, general form (Minnesota). | 1130. The same, where there are subsequent incumbrancers. |
| | 1131. For foreclosure of a bill of sale of chattels given as a chattel mortgage. |
| | 1132. For foreclosure of pledge. |

1115. Complaint for foreclosure of mortgage, all due, general form (Wisconsin).

I. That the defendant [*maker of note*] on the day of, 19.., for value received, executed and delivered to the plaintiff [*or, to one X.... Y....*] his certain promissory note in writing dated on that day, and thereby promised to pay to the said [*promisee*] or order the sum of dollars with interest thereon at the rate of per cent per annum, payable annually [*or otherwise according to conditions of note*] [*or set forth copy of note*].

II. That in order to secure the payment of the said indebtedness the defendants [*makers of mortgage*] did at the same time duly execute, acknowledge and deliver to the said [*promisee*], a mortgage bearing even date with said note and conditioned for the payment of the said indebtedness represented by said note,

whereby they mortgaged, granted, conveyed, bargained and sold to the said [*promisee*] those certain lands, with the appurtenances, situated in the county of state of Wisconsin, and described in said mortgage as follows [*insert full description*] upon the express condition that if the said [*mortgagors*] their heirs, executors, administrators or assigns, should well and truly pay or cause to be paid to the said mortgagee, his heirs, executors or assigns, the said sum of dollars and interest, according to the terms of said note, then the said note and said mortgage should cease and be null and void.

III. That among other provisions it was provided in and by said mortgage, that the said [*mortgagors*] should pay annually to the proper officers all taxes which should be assessed on said mortgaged premises; and that in case of the foreclosure of said mortgage the said mortgagor would pay to the said mortgagee or his assigns, in addition to the taxable costs in the foreclosure suit, reasonable and customary solicitor's fees [*or, the sum of dollars for solicitor's fees*].

IV. That said mortgage was duly attested by two subscribing witnesses, and was duly acknowledged, so as to entitle it to be recorded, and was received for record in the office of the register of deeds for the county of in Wisconsin, on the day of, 19.., at o'clock in the noon, and was recorded in volume of mortgage, on page

V. That the plaintiff is still the lawful owner and holder of said note and mortgage [*or, if plaintiff is an assignee of the original payee*]: That on the day of, 19.., the said note and mortgage was duly sold and assigned to the plaintiff for value, and that he is now the lawful owner and holder thereof.

VI. That the said defendants [*mortgagors*] have failed to comply with the terms of the said note and the conditions of the said mortgage by failing and neglecting to pay the sum of dollars, which became due and payable as principal on the day of, 19.., and by failing and neglecting to pay the sum of dollars interest which became due and payable on the day of, 19.., and by failing and neglecting to pay the taxes and assessments which have been assessed, taxed and levied on and against said mortgaged premises for the year 19.., by the proper authorities.

VII. That there is now justly due to the plaintiff upon said note and mortgage the sum of dollars as principal, with interest thereon from the day of, 19.., at per cent per annum, and the further sum of [*here state all other sums due*].

VIII. That the defendants [*insert names of all the defendants except those personally liable for the debt*] have or claim to have some interest in or lien upon the said mortgaged premises, or some part thereof, which interest or lien, if any, has accrued subsequently to the lien of said mortgage, and that no proceedings have been had, at law or otherwise, for the recovery of the sum secured by said note and mortgage, or any part thereof, and that no part thereof has been paid or collected except the interest up to the day of, 19..

IX. [*If the premises are inadequate security and an injunction be desired*]: That the said premises are an inadequate security for the said sum secured by said note and mortgage, with interest and costs; that the value of said premises consists in great part of buildings, fences, and standing and growing timber, and that said plaintiff fears that the defendants [*mortgagors and occupants*] will, unless enjoined by this court, commit waste upon said premises by removing, injuring or destroying said buildings or fences, and cutting down and hauling away said timber, or by other acts of waste; and that unless so enjoined they will, by such and other acts of waste thereon, impair the value of said mortgaged premises, and thereby so diminish and impair said plaintiff's security as to prevent him from realizing the amount of said note and mortgage from the same. [*Insert allegation of insolvency of the mortgagors, if such be the fact*].

WHEREFORE the plaintiff demands judgment of foreclosure and sale of the said mortgaged premises as provided by law; that the amounts due the plaintiff for principal, interest, costs, disbursements and solicitor's fees be adjudged and determined as well as the amount of unpaid tax liens upon said premises; that said defendants and all persons claiming under them, or any or either of them, subsequent to the commencement of this action may be barred and foreclosed of all right, claim, lien and equity of redemption in said premises, except the right to redeem the same before sale, as provided by law; that the said premises, or such part thereof as may be sufficient to pay the amounts due upon said note and mortgage may be adjudged to be sold, unless redeemed within the time and in the manner provided by law, and that the said tax liens be paid, and the plaintiff paid the amount due on said notes and mortgage, with interest to the time of such payment, and the costs and disbursements of this action, and the sum of dollars, solicitor's fees, with interest on the same, as allowed by law, from date of judgment, out of the proceeds of such sale, so far as the moneys arising from such sale and property applicable thereto will pay

the same, and that the plaintiff may have judgment and execution for any deficiency remaining unpaid after applying the proceeds of said sale thereon as prescribed by law against the said [*defendants personally liable*] who are personally liable for the payment of the debt secured by said mortgage; and that the defendants [*mortgagors and occupants*] be enjoined from committing waste on said premises, or doing any other act that may impair the value of the same at any time between the date of such judgment and the date of the sale of said premises; and that the plaintiff have such other or further judgment, order or relief as may be just and equitable.

1116. The same, amount not all due (Wisconsin).

[*Follow preceding form, but add to allegation VII*]: and that the further sum of dollars principal and dollars interest will become due upon said note and mortgage on the day of, 19..

[*Prayer for judgment as follows*]:

WHEREFORE the plaintiff demands judgment of foreclosure and sale of said mortgaged premises as provided by law; that the amounts actually due the plaintiff for principal, interest, costs, disbursements and solicitor's fees, as well as the amounts of unpaid tax liens upon said premises and the amounts to grow due hereafter upon said note and mortgage be adjudged and determined, that said defendants and all persons claiming under them or either of them subsequent to the commencement of this action may be barred and foreclosed, etc. [*proceed as in last preceding form.*]

1117. The same, where mortgage contained covenant to insure, and option clause.

I and II. [*As in first form in this chapter given.*]

III. That it was further provided in and by said mortgage that the said defendant [*mortgagor*] his heirs, executors, administrators or assigns, should pay annually to the proper officers all taxes which should be assessed on said mortgaged premises, on or before the first day of May next after such taxes shall have become due and payable; and should keep the buildings on said mortgaged premises insured against loss or damage by fire in some solvent insurance company so long as the money secured by said mortgage should remain unpaid, to the amount of at least dollars, and should assign or keep assigned to said mortgagee or his assigns the policy or policies of such insurance, and in case of failure so to do, then that it should be lawful for said mortgagee or his assigns to effect such insur-

ance, and that the premium or premiums, and other legal expenses, fees, costs, and charges paid for effecting the same, together with interest thereon at the rate of per cent per annum, should be a lien on said premises, and should be added to the amount of said note and mortgage; and that it was further covenanted and agreed in said mortgage that in case of non-payment of any sum of money [either of principal, interest, insurance money or taxes] at the time or times when the same should become due according to the conditions of said note or mortgage, or any part thereof, or in case of any neglect or refusal to keep said buildings insured, or the policy or policies assigned as aforesaid, then in such case the whole amount of said principal sum should, at the option of said mortgagee or his assigns, be deemed to have become due, and the same, with interest thereon at the rate aforesaid, should thereupon be collectible in a suit at law or by foreclosure of said mortgage, in the same manner as if the whole of said principal sum had been made payable at the time when any such failure in any payment should occur as aforesaid; and that in case of the foreclosure of said mortgage the said mortgagors would pay to said mortgagee or his assigns, in addition to the taxable costs in the foreclosure suit, reasonable and customary solicitor's fees.

IV. and V. [*As in first form in this chapter.*]

VI. That the said defendant [*mortgagor*] has failed to comply with the terms of the said note and the conditions of the said mortgage by failing and neglecting to pay the sum of dollars which became due and payable on the day of, 19.., and by failing and neglecting to pay the taxes and assessments which have been assessed and levied on and against said mortgaged premises for the year 19.., by the proper authorities, and by failing and neglecting to keep the buildings on said mortgaged premises insured in a solvent insurance company in the sum of dollars, and to keep assigned to said plaintiff the policy or policies of such insurance as covenanted in said mortgage; and that by reason of the aforesaid defaults of the said mortgagors the plaintiff was obliged to pay the sum of dollars for insurance upon said buildings on the day of, 19.., and that said plaintiff did, on the day of, 19.., elect that the whole amount of the principal sum aforesaid should become due, and on said last named day duly notified said defendants [*mortgagors*] of such election and demanded the immediate payment of the full amount of said principal sum and of the interest due thereon, of which said notice a copy is hereto attached and marked Exhibit A, and made a part of this complaint.

[Prayer for judgment as in the first form in this chapter, inserting claim that amounts paid for insurance be ascertained and added to mortgage.]

1118. Assignee against mortgagor, mortgagee who guaranteed payment, and subsequent purchaser, who assumed the mortgage.

[Insert in either of preceding forms, at the proper place, the following allegations]:

That on the day of, 19.., the defendant [*mortgagee*] by an instrument in writing under his hand and seal, duly assigned said bond and mortgage to the plaintiff for value, and thereby and for a consideration expressed therein, guaranteed to the plaintiff the payment of said bond and mortgage [*or, which assignment contained a covenant, of which the following is a copy, setting it forth*].

That on the day of, 19.., the defendants [*mortgagor*] and [*his grantee*] entered into an indenture under their hands and seals, whereby the said [*mortgagor*] conveyed to said [*grantee*] the mortgaged premises, subject to said mortgage, and said [*grantee*] covenanted that he would pay off and discharge the same as a part of the consideration of said conveyance [*or otherwise, as the covenant was*].

[Or, where the conveyance subject to the mortgage was not signed by the grantee]: That on the day of, 19.., the defendant [*mortgagor*] by deed dated on that day, duly conveyed said premises, subject to said mortgage, to the defendant [*owner of equity of redemption*]; which deed contained a covenant on the part of the latter, of which the following is a copy [*copy of covenant to assume mortgage*]. And said conveyance thereupon was accepted by said [*grantee*].

1119. Allegation of inadequacy of security where a receiver is desired.

[Insert in either of the preceding forms]: That the mortgaged premises consist of [*briefly stating the situation, e. g.*] a single village lot, with a house thereon, which is old and out of repair, and rapidly deteriorating; and the present value of the premises is about dollars, and they are subject to a prior mortgage, on which about dollars is due. That they are a scanty and insufficient security for the plaintiff's mortgage debt, and that the defendants, who are personally liable therefor, are insolvent.

[And insert in the prayer for relief]: That a receiver of the rents and profits be appointed, by order of the court, to apply the same to the plaintiff's demand.

1120. By mortgagee in possession against parties entitled to redeem, seeking accounting.

[*Allege execution of note and mortgage, default, etc., as in preceding forms, and proceed as follows*]:

That after the mortgage debt became due as aforesaid, the plaintiff entered into possession of the mortgaged premises, and the receipt of the rents and profits thereof, and has since continued, and still is, in possession.

That the said rents and profits have not been sufficient in amount to equal the annual interest upon the said bond and mortgage [*or state otherwise, as the fact may be*].

That the plaintiff has laid out considerable expenditures for permanent improvements upon said premises, to-wit [*stating the general nature and value of same*] which he claims should be allowed him as an off-set against so much of said rents and profits. And has also paid the sum of dollars for taxes and assessments [*or, if any prior lien has been discharged, state the nature of the lien, amount, and time of payment of same*]; all of which sums the said plaintiff also claims should be allowed him, and credited on his account against so much of said rents and profits; which several sums, when so applied and credited to the said plaintiff, charging the plaintiff with the amount of the rents and profits so received by him, will leave remaining due to said plaintiff, on his said bond and mortgage, about dollars.

That the defendant [*junior incumbrancer*] has, or claims an interest in said mortgaged premises, under and by virtue of a mortgage thereon from the said defendant [*mortgagor*] subsequent to the mortgage of the plaintiff; and the defendant Q.... R.... has, or claims, an interest therein, etc., etc. [*setting forth generally the interest of the respective parties*].

That the plaintiff has applied to the said defendants [*junior incumbrancers*] and requested them to pay the plaintiff the said sum so due on the bond and mortgage held by the plaintiff, or come to an accounting with him thereon for the said rents and profits [*permanent improvements and advances*], and, after the proper charges and credits, pay the said plaintiff what should appear to be due him on his said bond and mortgage; or, in default thereof, to release their right and equity of redemption in said mortgaged premises. But the said defendants have hitherto refused, and still refuse so to do, or to comply with any part of said plaintiff's request.

WHEREFORE the plaintiff demands judgment of foreclosure and sale of said mortgaged premises as provided by law, that an account may be taken of the amount due and owing to

the plaintiff for principal and interest on his said bond and mortgage; and that an account may also be taken of the rents and profits of the said mortgaged premises which have been received by said plaintiff, and also of the expenditures of the said plaintiff for permanent improvements, and for taxes and assessments [*or, for the amount so paid for prior incumbrances, etc., as the case may be*] that the amount due the plaintiff be adjudged and determined [*continue as in preceding forms*].

1121. To have deed absolute declared a mortgage, and foreclosed.¹

[*Allege existence of the debt, as in preceding forms and then allege giving of deed instead of mortgage, substantially as follows*]:

That the defendants [*mortgagors*] on or about the day of, 19.., executed, acknowledged and delivered to the plaintiff a deed in fee simple, whereby the said [*mortgagors*] conveyed and sold to the plaintiff the following described premises [*insert description*] which said deed was intended and agreed by the parties to be and to operate simply as a mortgage of said premises, and as security for the payment of the debt aforesaid with interest [*other allegations substantially as in preceding forms, inserting in demand for judgment*]; that the said deed may be adjudged to be a mortgage and a first lien upon said premises for the amount of said debt and interest.

1122. For foreclosure of mortgage, general form (Minnesota).

I. That on the day of, 19.., the defendant [*promisor*] executed and delivered to the plaintiff his promissory note, of which the following is a copy [*insert copy of note*].

II. That to secure payment of said note the defendants [*mortgagors*] at the same time duly executed and acknowledged and delivered a mortgage bearing date on that day, whereby they mortgaged, conveyed and sold to the plaintiff the following described premises with their appurtenances [*insert description*] upon consideration, however, that if the said [*mortgagors*], their heirs, executors and administrators should well and truly pay or cause to be paid to the said plaintiff, his heirs, executors, administrators or assigns the said sum of dollars with interest, according to the terms of said note, then said mortgage

¹ For a case involving this principle, where a deed was held to be in fact a mortgage, and a number of equitable interests were in-

involved and adjudicated upon, see *Schneider v. Reed*, 123 Wis. 488 s.c. 101 N. W. 682.

should be null and void; otherwise to remain in full force and effect. That it was further provided in and by said mortgage that [*here insert other provisions for payment of taxes, insurance, etc., if any, as in the third form in this chapter*].

III. That said mortgage was duly recorded in the office of the register of deeds, in and for the county of on the day of, 19.., at o'clock .. M. in Book of Mortgages, on page

IV. That no part of said sum has been paid except [*state payments made*] and that there is now due on said note and mortgage the sum of dollars with interest thereon from the day of, 19..

V. [That the defendants,—*mortgagors*—failed to keep said premises insured, and in consequence thereof plaintiff caused them to be insured in the M.... Insurance Company, of for the term of from the day of, 19.., and paid therefor the premium of dollars].

VI. [That the defendants,—*mortgagors*—failed to pay the taxes on said premises for the year 19.. amounting in all to the sum of dollars and in consequence thereof plaintiff paid the same].

VII. That no suit at law or other proceedings has been had to recover the debt secured by said note and mortgage, or any part thereof.

VIII. That the defendants [*insert names of all the defendants except those personally liable for the debt*] have, or claim to have some interest in or lien upon said mortgaged premises, which interest or lien, if any, has accrued since the lien of said mortgage, and is subject thereto. That no personal claim is made against any defendant except [*name those personally liable*].

WHEREFORE plaintiff demands judgment adjudging the amount due on said note and mortgage, with costs and disbursements, including dollars as attorney's fees, and dollars the amounts paid by plaintiff for taxes and insurance upon the said premises; and adjudging and directing a sale of the premises aforesaid, and the payment from the proceeds thereof of the costs and disbursements of this action, and the amount due the plaintiff as aforesaid, together with interest to the time of such payment; and that the defendants, and all persons claiming under them may be barred and foreclosed of all rights, claims, liens, and equity of redemption in said mortgaged premises, and every part thereof, except only the right to redeem the said premises within one year from the date of the order confirming said sale thereof, pursuant to the statute in

such case made and provided; and that plaintiff have such other and further relief as to the court shall seem just and proper.

1123. For foreclosure of mortgage, general form (North Dakota and South Dakota).

[In North and South Dakota the forms given in this chapter for use in Wisconsin and Minnesota may be substantially followed, with the following demand for judgment]:

WHEREFORE the plaintiff demands judgment for the amount due on said note and mortgage, and costs and expenses of this action, together with the further sum of dollars attorney's fees stipulated as aforesaid, and that the defendants and all persons claiming under them, or either of them, subsequent to the commencement of this action, may be barred and foreclosed of all right, claim, lien, and equity of redemption in the said mortgaged premises, and every part thereof; that the premises may be decreed to be sold according to law; that out of the moneys arising from the sale the plaintiff may be paid the amount adjudged to be due on said note and mortgage, with interest at the time of such payment, and costs and expenses of sale, together with the attorney's fees as aforesaid, so far as the amount of such moneys properly applicable will pay the same, and that the defendant [*promisor*] may be adjudged to pay any deficiency which may remain after applying all of said moneys so applicable thereto; and that the plaintiff may have such other and further relief, or both, in the premises as shall be just and equitable.

1124. For foreclosure, general form (Nebraska).

I. That on the day of, 19.., the said defendant [*promisor*] made and delivered to the plaintiff his promissory note in writing, of which the following is a copy [*insert copy of note*].

II. That to secure the payment of said note the said defendant, on said day, executed and delivered to the plaintiff a mortgage deed and thereby conveyed to the plaintiff the following described real estate situate in county of, viz. [*describe the premises*], which deed contained the following conditions [*insert copy of conditions*].

III. That said mortgage was duly recorded in the office of the recorder of real estate mortgages of county, on the day of, 19.., in Book of Mortgages at page

IV. That the plaintiff is now the legal owner and holder of said note and mortgage, and that no proceedings at law have

been had for the recovery of the debt secured thereby, or any part thereof, nor has said debt or any part thereof [except, etc.] been collected and paid, and there is now due from the defendant to the plaintiff upon said note and mortgage the sum of dollars, with interest from the day of, 19..

WHEREFORE plaintiff demands judgment that an account may be taken of the amount due on said note and mortgage, that said defendants may be foreclosed of all equity of redemption or other interest in said mortgaged premises, and that said premises may be sold according to law, and out of the proceeds thereof the plaintiff may be paid the amount adjudged to be due him on said note and mortgage, with interest and costs of suit; that the defendant [*promisor*] be adjudged to pay any deficiency which may remain after applying the proceeds of said sale to the payment of said debts, and for such other relief as may be just and equitable.

1125. The same, where there are junior incumbrancers, and agreement to pay taxes which has been breached (Nebraska).

[Proceed as in last preceding form, inserting before prayer for judgment]:

V. That it was agreed in said mortgage deed that the principal sum in said note mentioned should immediately become due and payable if said sum of money or any part thereof, or any installment of interest thereon should not be paid when due, or if the taxes and assessments against said premises were not paid at or before the time the same became by law delinquent, or if said mortgagor should fail to keep and perform all the covenants and agreements on his part to be kept and performed.

VI. That although an installment of interest on said note became due and payable on the day of, 19.., said defendant [*mortgagor*] has not paid the same, but has failed, neglected and refused to pay the same or any part thereof, whereby the whole of said debt, to-wit, ... dollars, and the interest thereon as provided for in said note and mortgage, became due and still remains due and payable from said defendant [*promisor*] to the plaintiff.

VII. That the defendants [*name junior incumbrancers*] have or claim to have some interest in or lien upon said premises, which said interests or liens, if any, are junior and subject to the lien of said mortgage of the plaintiff, but no personal claim is made against any of said defendants except the said [*promisor*].

WHEREFORE the plaintiff demands judgment that an account may be taken by this court of the amount due the plaintiff on his said note and mortgage; that the plaintiff be adjudged to have a first lien on the mortgaged premises for the amount so found due, and that the liens of, and interest in the premises of each and all the defendants, if any they have, be adjudged to be junior and inferior to the lien of the plaintiff. That the defendant [*the mortgagor*] be adjudged to pay the plaintiff the sum so found due; that in default of such payment the mortgaged premises may be sold according to law, and that each and all of the defendants in this cause may be forever barred and foreclosed of any and all right, title, interest or equity of redemption in and to said premises; that out of the proceeds of the sale thereof the plaintiff may be paid the amount found due him, together with his costs herein expended; and for such other and further relief as may be just and equitable.

1126. For foreclosure, general form (Iowa).

[The forms just given for use in Nebraska may be substantially followed, attaching a copy of the mortgage and adding thereto, if the facts call for it, the following]:

That the defendant [*mortgagor*] failed and neglected to pay the taxes levied and assessed upon said premises for the year 19.., whereby the plaintiff was compelled to and did, on the day of, 19.., pay the said taxes so levied amounting to the sum of dollars, and that the plaintiff has necessarily expended the sum of dollars for an abstract of title of said premises preparatory to the bringing of this action.

[Prayer for judgment as follows]:

WHEREFORE plaintiff demands judgment against the said defendant [*promisor*] for the sum of dollars, with interest from, 19.., together with the said sum of dollars paid to discharge tax liens as aforesaid with interest thereon at per cent. from the date of payment, also for the sum of dollars paid for abstract of title, and for costs, including an attorney's fee of dollars; that said judgment be decreed to be a lien upon said mortgaged premises from the day of, 19.. [*date of mortgage*]; that the liens and interest of the defendants and each of them be decreed to be junior and subject to the lien of the plaintiff, and they and each of them be forever barred and foreclosed from all title, claim, lien, interest or equity of redemption in the said mortgaged premises, and that a special execution issue for the sale of said premises or so much thereof as shall be necessary to

satisfy said judgment, with interest and costs; * and that it be forever adjudged that in case any part of said premises be sold under said judgment and be not redeemed within one year from the date of such sale, that a writ of possession issue out of this court directed to the sheriff of said county, commanding him to put the purchaser under such sale in possession of said premises, and for such further relief as may be equitable.

1127. The same, amount not all due (Iowa).

[*Follow preceding form, adding to the prayer at the **]: and that the court adjudge and decree that in case it becomes necessary to sell any part of said premises to satisfy said judgment, that a sufficient amount thereof be sold to satisfy not only the said judgment, but the principal and interest of said note which is yet to become due.

1128. For foreclosure of title bond (Iowa Code sec. 4297).

I. That on the day of, 19.., the plaintiff was the owner in fee of the following described real estate [*insert description*].

II. That on the day of, 19.., the plaintiff sold said real estate to the defendant [*naming him*] for the sum of dollars and that said defendant in part payment thereof executed to this plaintiff his certain promissory note, of which the following is a copy [*insert copy of note*].

III. That at the time of the execution of said note this plaintiff executed and delivered to the said defendant his certain title bond to said premises, a copy of which is attached hereto marked Exhibit A, and made a part hereof.

IV. That said bond was duly filed for record in the office of the recorder of deeds of county, Iowa, on the day of, 19.., and duly recorded in Book page

V. That said note is still owned and held by the plaintiff and that there is now due and unpaid thereon the sum of dollars with interest from, 19..

VI. That the defendants [*naming them*] have or claim to have some lien upon, or interest in, said premises, but that whatever lien or interest the said defendants or either of them may have in said premises is junior and inferior to the lien of plaintiff thereon.

VII. [*Insert allegations as to taxes and abstract, as in preceding forms, if the facts warrant.*]

WHEREFORE the plaintiff demands judgment that the defendant [*promisor*] be required to specifically perform his said contract, or that in case he fail and neglect so to do that the

plaintiff have judgment against the said [promisor] for the sum, etc. [follow prayer for judgment as in last two forms].

1129. For foreclosure of chattel mortgage, general form.²

I. [*Allege the indebtedness and the giving of a note or other evidence thereof, as in preceding forms in this chapter.*]

II. That to secure the payment of said note the defendant on the day of, 19.., executed and delivered to the plaintiff an instrument in writing duly signed [*and acknowledged*] by said defendant, by which he conveyed to the defendant as security for said note the following described goods and chattels, viz. [*describe goods as in the mortgage, or attach copy of mortgage as part of complaint*].

III. That on the day of, 19.., the said instrument was duly filed for record in the office of the [*state proper officer*].

IV. That the defendant did not pay said note when the same became due, nor has he yet paid the same, or any part thereof, and no proceedings have been had at law for the recovery of said debt, and that there is now due from the defendant to the plaintiff thereon the sum of dollars, with interest from, 19...

WHEREFORE plaintiff demands judgment against the said defendant for the sum of dollars, with interest from the day of, 19.., with costs, and that said goods may be ordered sold as provided by law, and the proceeds thereof applied in payment of the amount so adjudged with costs; that the defendant be barred and foreclosed of all right, interest, or lien in or upon said property, and that the plaintiff have such other and further relief as may be just.

1130. The same, where there are subsequent incumbrancers.

[*Proceed as in last preceding form, inserting*]:

That the defendants [*name subsequent incumbrancers or lienholders*] have or claim to have some interest in or lien upon

² In North Dakota foreclosure of chattel mortgages and other liens on personal property is authorized by statute. N. Dak. Rev. Codes secs. 5897 *et seq.* In states where there is no such express statutory provision, foreclosure of chattel mortgages by action in equity may generally be maintained in cases where there is no power of sale in the mortgage, or where by reason of conflicting claims of other lienholders or other extrin-

sic facts it becomes necessary or desirable to ascertain and establish the rights of all parties by judgment of a competent court. Bank v. Damm, 63 Wis. 249; Forepaugh v. Pryor, 30 Minn. 35; Packard v. Kingman, 11 Iowa, 219.

Where there are no such circumstances, and the objection of adequate remedy at law is properly taken, the right to foreclose in equity may be doubtful.

said mortgaged property, which they and each of them claim is superior to the interest of this plaintiff therein, but which are in fact subject and inferior to the plaintiff's said mortgage lien.

1131. For foreclosure of a bill of sale of chattels given as a chattel mortgage (adapted from Bank v. Damm, 63 Wis. 249).

I. [*Allege indebtedness as in previous forms in this chapter.*]

II. That to secure payment of said indebtedness the defendant [*promisor*] on the day of, 19.., executed and delivered to the plaintiff a bill of sale of the following described personal property [*describe same*] a copy of which bill of sale is attached hereto and marked Exhibit A, and that it was then and there understood and agreed by the parties thereto that the same was given and was to operate only as a chattel mortgage of the property therein described to secure the payment of said indebtedness, and that if said defendant should pay the said indebtedness at the time and in the manner agreed upon in said note then the said bill of sale should be null and void.

III. That the said bill of sale was duly filed for record as a chattel mortgage in the [*proper office*] on the day of, 19..

[*Allege default, and claims of other defendants as in the last two preceding forms.*]

[*Insert in demand for judgment*]: That the said bill of sale be adjudged to be a chattel mortgage upon said property, and that the plaintiff recover judgment against the said [*promisor*] for the sum of, etc. [*proceed as in last two preceding forms*].

1132. For foreclosure of pledge (Iowa Code sec. 4286).

I. [*State indebtedness as in previous forms in this chapter.*]

II. That to secure payment of the said indebtedness, and as collateral security therefor, the defendant [*pledgor*] on the day of, 19.., pledged and delivered to this plaintiff the following described personal property [*insert description*] upon the understanding and agreement then and there made between the said parties that in case the said defendant [*pledgor*] should well and truly pay the plaintiff the indebtedness aforesaid, with interest as agreed, then the said pledged property should be returned to the said defendant and the claim of the plaintiff thereon should be released, otherwise that the said pledge should remain in full force and effect [*state any special agreement made by the parties*].

III. [*State default, etc., substantially as in the previous forms given for foreclosure of chattel mortgages.*]

[*Demand for judgment substantially as in chattel mortgage foreclosure.*]

CHAPTER LXV.

COMPLAINTS IN ACTIONS TO REDEEM MORTGAGED PREMISES.

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|---|---|
| 1133. By mortgagor against mortgagee. | plaintiff not being a party to the former action. |
| 1134. The same, where mortgagee is in possession. | 1136. By grantor to have a deed declared a mortgage, and to redeem therefrom. |
| 1135. By junior mortgagee against purchaser under foreclosure of a senior mortgage, | 1137. By lessee of mortgagor. |

This is an equitable action and may be maintained by the mortgagor or by any one having a definite interest in the mortgaged premises, and who has no adequate remedy at law. Thus, assignees or grantees of the equity of redemption, heirs, devisees, and personal representatives of the mortgagor, junior incumbrancers or judgment creditors may maintain the action.

It is not necessary to the right that a tender be made before action, or that the money be deposited in court, though these allegations are frequently made and may affect the question of costs; it is sufficient, however, so far as the right to maintain the action is concerned, that the complaint allege a readiness to pay whatever is due.

1133. By mortgagor against mortgagee.

I. That on the day of, 19.., the plaintiff executed to the defendant a bond under his hand and seal, dated that day, conditioned to pay, etc. [*state condition of bond, or if note was given describe the same*] and, being owner in fee [*or otherwise*] of the premises hereinafter described, executed to the defendant a mortgage of even date herewith, to secure the payment thereof, whereby the plaintiff granted, bargained, and sold to the defendant the said premises, upon the condition nevertheless that [*state condition of the mortgage*] which said premises are described as follows: [*insert description from mortgage*].

II. That the plaintiff has paid to the defendant all the interest due on said dollars from the day of, 19.., up to the day of, 19..; and that on the day of, 19.., when [*or, and after*] the said mort-

gage became due, he tendered to the defendant the sum of dollars, together with all the interest [and costs] due thereon, and ever since has been ready and willing to pay the same, and herewith brings the same into court for the use of the defendant, but the defendant has at all times refused to receive the same, or to deliver up said mortgage to be cancelled.

WHEREFORE the plaintiff demands judgment that an account be taken of the amount now due the defendant on said bond and mortgage for principal, interest [and costs]; and that the plaintiff may be at liberty to redeem said mortgaged premises upon payment of whatever may be found so due; and that the defendant, upon payment thereof, acknowledge satisfaction of said mortgage, and discharge the same of record, and that the plaintiff have such further relief as may be equitable.

1134. The same, where mortgagee is in possession.

I. [*As in last preceding form.*]

II. That the plaintiff has paid to the defendant the interest accruing on said bond [*or note*] and mortgage up to and including the day of, 19.., to-wit, the sum of [*here state payments, and when made*] and on the day of, 19.., duly tendered to the defendant the further sum of dollars which said defendant refused and still refuses to receive.

III. That on or about the day of, 19.., the defendant entered into possession of said premises, and has ever since retained possession thereof, and received the rents and profits of the same, amounting to the sum of dollars [*or, amounting to a sum greater than the amount due on said mortgage*] which sum he has applied to his own use.

IV. That on the day of, 19.., the plaintiff applied to the defendant to account for said rents and profits, and to pay the plaintiff the amount of the excess thereof over and above said mortgage debt, and to deliver possession of said premises to the plaintiff and discharge said mortgage which defendant then refused and still refuses to do.

WHEREFORE the plaintiff demands judgment that an account be taken of the amount due on said note [*or bond*] and mortgage, and also of the rents and profits of said premises so received by the defendant, and that plaintiff be permitted to redeem the said premises upon payment of the amount, if any, which may be found due the said defendant, and that defendant be required to discharge and cancel said mortgage of record, and deliver the possession of said premises to the plaintiff, and for such further relief as may be equitable.

1135. By junior mortgagee against purchaser under foreclosure of a senior mortgage, plaintiff not being a party to the former action.

I. That on the day of, 19.., one E.... F.... executed and delivered to one G.... H.... a mortgage upon the following described real estate [*insert description*] to secure payment of the sum of dollars and interest, due in years from that date, according to the conditions of a certain promissory note of even date with said mortgage.

II. That on the day of, 19.., a judgment of foreclosure and sale was duly rendered on said mortgage in the court of county in a certain action then and there pending and said premises were thereafter duly sold under said judgment to the defendant for the sum of dollars, which sale was thereafter duly confirmed by said court, and a deed duly executed and delivered to the defendant, who ever since has been and is now in possession of said premises.

III. That on the day of, 19.., said E.... F.... executed and delivered to the plaintiff his promissory note in writing, in the words and figures following [*set forth copy of note, or plead legal effect*].

IV. That to secure the payment of said note said E.... F.... on said day executed and delivered to plaintiff a mortgage and thereby granted, bargained and sold to plaintiff the above described premises, upon condition nevertheless that [*here state condition*].

V. That said mortgage was duly recorded in the office of the of deeds, of county on the day of, 19..

VI. That said E.... F.... has not paid the amount secured by said last named mortgage, as required by the conditions thereof, and that no proceedings have been had at law or in equity for the recovery of the debt secured thereby, nor has any part thereof been collected and paid, and there is now due thereon the sum of dollars.

VII. That in the said action to foreclose the mortgage under which the defendant claims title to said premises, the plaintiff was not made a party, nor did he appear in the action, nor does the judgment in that action affect his right in the premises.

VIII. That on or about the day of, 19.., the plaintiff duly tendered to defendant the amount due on his said foreclosure judgment, with interest to that date, and demanded that defendant release and convey said premises to the plaintiff and that defendant refused so to do.

WHEREFORE the plaintiff demands judgment that he be

allowed to redeem said premises upon paying to the defendant the amount of defendant's said judgment, with interest within a reasonable time to be fixed by the court, and that upon such payment the defendant be required to release and convey to the plaintiff all his right, title and interest in said premises acquired under said judgment, and under said sale, and that the defendant surrender possession of said premises to the plaintiff and for such further relief as may be equitable.

1136. By a grantor to have a deed declared a mortgage, and to redeem therefrom.

I. That on the day of, 19.., the plaintiff was the owner and in possession of the following described premises [*insert description*] of the value of dollars.

II. That on said day the plaintiff, being in embarrassed circumstances, borrowed of the defendant the sum of dollars for years, with interest at per cent. [*if note was given, set forth the fact*].

III. That to secure the payment of said loan the plaintiff executed and delivered to defendant a warranty deed in fee simple of said premises, which deed though absolute in form, was intended by both plaintiff and defendant to be a mortgage only, and to stand as security for the repayment of said loan, and to serve no other purpose.

IV. That on the day of, 19.., said defendant entered into possession of said premises, under said deed, and has received the rents and profits thereof and applied the same to his own use, which said rents and profits amount to the sum of dollars.

V. That on or about the day of, 19.., the plaintiff offered to pay said defendant the amount of said loan, over and above the rents and profits so received by him, and requested him to account for the rents and profits of said premises, and to deliver up possession of the same upon being paid whatever sum should be found to be justly due him upon said account, but said defendant then refused, and still refuses, to account with the plaintiff, but insists upon retaining possession of said estate.

VI. That the plaintiff is ready to pay whatever may be justly due on said loan, and hereby offers to bring the money into court for that purpose.

WHEREFORE plaintiff demands judgment that an account may be taken of the amount due said defendant, after deducting the rents and profits received, and that upon the payment by plaintiff of the amount so found due, said defendant be required

to reconvey said premises to the plaintiff, and for such other relief as may be equitable.

1137. By lessee of mortgagor.

I. That on the day of, 19.., the defendant [*mortgagor*] was the owner in fee of the following described premises, and leased the same to the plaintiff by an indenture dated on that day, a copy of which is annexed as a part of this complaint; and that by virtue of said lease the plaintiff entered upon, and ever since has been, and still is, in possession of said premises, and is vested with the unexpired term thereof; which premises are [bounded and] described as follows [*description*].

II. That on the day of, 19.., said [*mortgagor*] made to the defendant [*mortgagee*] a mortgage upon the same premises, to secure dollars, payable on the day of, 19...

III. That on the said day the mortgage became due, but has not been paid; and that said [*mortgagee*] has commenced an action [*or, proceedings under the statute*] to foreclose the same for such default.

IV. That on the day of, 19.., the plaintiff tendered dollars to said [*mortgagee*] being the amount due on said mortgage, with interest, and the cost of said action [*or, proceeding*] up to that time, in redemption of said mortgage, and has ever since been ready and willing to pay the same; and did then request him to assign the same to the plaintiff, but he refused so to do.

WHEREFORE the plaintiff demands judgment that he be allowed to redeem the said mortgage upon paying to the defendant [*mortgagee*] the amount due upon the mortgage; and that upon such payment the defendant, by an assignment duly executed and acknowledged by him, assign said bond and mortgage to the plaintiff; and that the plaintiff have such further relief as may be equitable.

CHAPTER LXVI.

COMPLAINTS FOR SPECIFIC PERFORMANCE OF CONTRACTS.

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| 1138. Vendor against purchaser. | |
| 1139. The same, when time has been extended by agreement. | |
| 1140. Purchaser against vendor, claiming interest on purchase money which has lain idle, and deduction for deficiency and for outstanding incumbrance. | |
| 1141. Upon an exchange of property, possession having been taken. | |
| 1142. By vendee against vendor to enforce oral contract of sale when contract has been so far performed as | to take the case out of the statute of frauds. |
| | 1143. By creditor, for performance of agreement to give a chattel mortgage. |
| | 1144. By lessee for specific performance of an agreement to lease real estate. |
| | 1145. For specific performance of an agreement to execute a chattel mortgage on personal property, and to set aside fraudulent disposition of the property. |
| | 1146. To enforce specific performance of an agreement by a railroad to construct a farm crossing. |

The action for specific performance is purely equitable, and while controlled by settled legal principles a decree is never demandable as a matter of abstract right, but is within the sound discretion of the court under established principles of equity. It will never be granted if there is an adequate remedy at law; the plaintiff must always be ready to do equity, and the court may impose equitable terms upon the plaintiff. A contract may be reformed and specifically enforced in the same action, but the court will ordinarily refuse its aid where the contract lacks certainty as to its essential terms or where any of such terms depend on the will, discretion or personal acts of individuals which cannot be controlled by the court. *Park v. Ry. Co.*, 114 Wis. 347. Nor will a court decree specific performance when the contract is not fair, just and reasonable in all its parts. *Mulligan v. Albertz*, 103 Wis. 140. If the action be for specific performance of a contract for sale of lands, it is not necessary to allege in the complaint that the plaintiff has no adequate remedy at law, such contracts being enforced as a matter of course; but if the contract be for sale of personalty the peculiar

facts which take the case out of the general rule that money damages are an adequate remedy for the breach must be stated. 20 Enc. Pl. & Pr., p. 438, notes.

1138. Vendor against purchaser.

I. That on and before the day of, 19.., the plaintiff was and still is the owner in fee [*or otherwise*] and possessed of certain real property hereinafter described.

II. That the defendant, being desirous to purchase the same, entered into an agreement in writing with the plaintiff, dated on that day, of which the following is a copy [*copy of contract, giving a description of the property, of which a copy is attached hereto and made a part of this complaint, marked Exhibit A; or set forth the legal effect of the contract*].

III. That the defendant then paid to the plaintiff dollars as part of the purchase money mentioned in said contract.

IV. That the plaintiff has always been, and still is, ready and willing to perform the said agreement on his part; and, on being paid the remainder of said purchase money [with interest] to convey, etc. [*as by the agreement*] and to let the defendant into possession of said premises, and the rents and profits thereof, from the time in the agreement specified.

V. That on the day of, 19.., at the plaintiff duly tendered to the defendant a deed of the said premises pursuant to the agreement; but the defendant then and ever since has refused to accept the same and to pay the balance of the purchase money [*or, and to give the bond and mortgage agreed for, or otherwise, according to the contract*].

WHEREFORE the plaintiff demands judgment that the defendant perform said agreement, and pay to the plaintiff dollars, the remainder of said purchase-money, with interest from the day of, 19.., the time when it ought to have been paid [*or, and give to the plaintiff the bond and mortgage*] and that the plaintiff have such other or further relief as may be equitable, and that he recover the costs of this action.

1139. The same, when time has been extended by agreement.

[*Insert in the foregoing form, between allegations IV and V the following allegation*]:

That thereafter and on or about the day of, 19.., the plaintiff and defendant entered into an additional written agreement, by the terms of which the time of performance of said first described contract, and the payment of the

money therein mentioned [*or, of the delivery of the bond and mortgage aforesaid*] was duly extended to the day of, 19.., at at the hour of o'clock a. m.

1140. Purchaser against vendor, claiming interest on purchase money which has lain idle, and deduction for deficiency and for outstanding incumbrance.

I. That on the day of, 19.., the defendant, being owner in fee [*or otherwise*] and possessed of certain real property hereinafter described, and desirous to dispose of the same, made [by one M.... N.... his agent, duly authorized thereto] an agreement in writing with the plaintiff, of which a copy is attached hereto, made a part of this complaint, and marked Exhibit A [*or set forth agreement made according to its legal effect*].

[II. That on the execution thereof the plaintiff paid to the defendant dollars as a part payment of the purchase money therein mentioned.]

[III. That afterwards, by mutual agreement between the plaintiff and the defendant, the time for completing said contract was extended to the day of, 19..]

IV. That the plaintiff duly performed all of the conditions thereof on his part, and has always been ready and willing, and still is, to fulfill the agreement on his part; and, on having a good and marketable title made of said premises, and a conveyance of the fee thereof, free from all incumbrances [*or otherwise, according to the contract*] to pay the residue of the purchase money to the defendant [*and to give the bond and mortgage agreed*].

V. That on the day last mentioned, at the plaintiff duly tendered to the defendant said sum of dollars, and requested such a conveyance [and offered to give the bond and mortgage agreed for, on receiving the same], but the defendant refused and still refuses, to execute or deliver such conveyance.

.VI. [*Where purchase money lay idle*]: That dollars, the residue of said purchase money, has been ready and unproductive in the hands of the plaintiff, for completing the purchase, ever since the said day on which it ought to have been completed.

VII. [*Where there is a deficiency*]: That since the making of said agreement the plaintiff has discovered that there is a deficiency in the quantity of said and that the same does not contain acres, but only acres.

VIII. [*Where a claim of a right of way proved to be un-*

founded]: That at the time of treating for said contract said [*defendant or agent*] represented to the plaintiff that there belonged to the said estate a right of way from the said estate to street, and that the said [*defendant*] could make a good title in fee to the said right of way, which said right of way rendered the said estate very convenient for the business which the plaintiff intended to carry on upon the said premises; and that before the agreement of the said day of, 19.., was signed, a certain plan made for the purpose of showing how buildings might be erected on the said estate, was shown to the plaintiff by the said [*defendant or agent*] and upon that building-plan the said right of way was delineated; and by the said building-plan, and the representations of the said [*defendant or agent*] the plaintiff was led to expect that he should have a right of way directly from the said estate to street, and the expectation of having such right of way was a great inducement to the plaintiff to purchase the said estate, and when the said agreement was signed, the said building-plan was delivered to the plaintiff, and the same is now in the plaintiff's possession; but since the signing of the said agreement one [*an adverse claimant*] has claimed to be exclusively entitled to the said right of way, and she brought an action in the court for the recovery of the possession thereof, and in that action she obtained a verdict, and she has recovered possession of the said road or way from the said estate to street, and she has since sold the same, and that the plaintiff is now prohibited from using the said road or way; and that the plaintiff, in the expectation that he should have a good title made to the said estate, entered into the possession thereof soon after signing the said agreement, and has ever since been, and now is, in the possession thereof, and has, at a great expense, to-wit, ... dollars, purchased a piece of ground, and made a road from the estate to street.

IX. [*Where there is an outstanding incumbrance*]: That the defendant's title to the premises is incumbered by a mortgage to one M.... N.... for dollars, with interest semi-annually, which mortgage is not payable until the day of, 19..

WHEREFORE the plaintiff demands judgment: (1) That a just deduction from the purchase money be made on account of said deficiency, and on account of the plaintiff not having the benefit of said right of way, and on account of said incumbrance, and for interest on plaintiff's purchase money which has lain idle; and that on payment of the residue of said purchase money [*or, in delivery of said bond and mortgage*] the

defendant be adjudged to specifically perform said agreement; and that the plaintiff have such further relief as may be equitable, with the costs of this action.

1141. Upon an exchange of property, possession having been taken.

I. That on the day of, 19.., the plaintiff and the defendant entered into an agreement in writing, dated that day, whereby in consideration of the covenants on the part of the plaintiff hereinafter mentioned, the defendant covenanted that he would, on or before the day of, 19.., convey to the plaintiff in fee by warranty deed, and with covenants for quiet enjoyment and against incumbrances [*or otherwise, according to the agreement*] a lot of land situate in the town of and county of in the state of and described as follows [*description of premises*]. In consideration whereof the plaintiff covenanted in and by said agreement [*state his covenant in same manner*]. And it was further provided in said agreement that each party might enter into immediate possession of the premises so to be conveyed to him, and have and receive the profits to his own use.

II. That thereafter, in pursuance of said agreement, the plaintiff and the defendant respectively took possession of the premises so to be conveyed to them, and still severally occupy the same.

III. That the plaintiff duly performed all the conditions of said contract on his part, and on the day of, 19.., tendered to the defendant a warranty deed of said premises in with covenants for quiet enjoyment and against incumbrances, duly signed and sealed by the plaintiff, and demanded of him a deed of said premises in ; but the defendant refused to execute and deliver such to the plaintiff, and still neglects so to do.

WHEREFORE the plaintiff demands judgment that the defendant specifically perform his said agreement and convey to the plaintiff the said lot of land which by said agreement he contracted to convey, and that he be required to receive plaintiff's said deed, and that the plaintiff have such further relief as may be equitable, and the costs of this action.

1142. By vendee against vendor to enforce oral contract of sale when contract has been so far performed as to take the case out of the statute of frauds.

I. That the defendant was on the day of, 19.., the owner in fee of the following real estate [*insert description*], and that defendant still has the legal title to said lands.

II. That on said day defendant sold said premises to the plaintiff for the sum of dollars, payable [*state terms*] by an oral contract, whereby he agreed to convey said premises to plaintiff by a warranty deed upon the payment by the plaintiff of the consideration aforesaid.

III. That defendant thereupon delivered the possession of said premises to the plaintiff under said contract, and the plaintiff has ever since been and still is in possession of the same under said contract.

IV. That plaintiff has paid to the defendant the entire consideration aforesaid [*or, the following sums to apply upon said consideration, to-wit, state amounts and when paid*].

V. That there is still due said defendant the sum of dollars under said contract, which sum the plaintiff tendered to the defendant on the day of, 19.., but the defendant then refused and still refuses to execute and deliver a proper deed of said premises to the plaintiff.

VI. That plaintiff, while in possession of said premises under said contract, has erected a building upon said premises [*or made other improvements, specifying them*] of the value of dollars.

VII. That plaintiff has duly performed all of the conditions of said contract on his part, and now brings the balance of the purchase money, to-wit, the sum of dollars into court, and offers the same to said defendant upon his executing and delivering to plaintiff a proper conveyance of said premises according to the terms of said contract.

WHEREFORE plaintiff prays that defendant be required to receive the said sum so brought into court, and to specifically perform the said contract on his part, by executing and delivering to the plaintiff a warranty deed of the said premises, and that the plaintiff have such further relief as may be equitable, and the costs of this action.

1143. By creditor, for performance of agreement to give a chattel mortgage.

I. That on the day of, 19.., the plaintiff and defendant entered into an agreement whereby the plaintiff, then being the owner of [*designate the goods, or if numerous, attach schedule*] agreed to sell and deliver the same to the defendant; in consideration whereof the defendant promised to pay him dollars cash upon the delivery of said goods and dollars, ... months from the date of said delivery, and to give on the delivery of such goods a chattel mortgage

thereon to the plaintiff, to secure the payment of said dollars.

II. That pursuant to said contract the plaintiff, on the day of, 19.., delivered said goods to the defendant, who is now in possession thereof, and who paid him the sum of dollars, but failed to deliver to him a chattel mortgage thereon, pursuant to said agreement; and although afterwards, on the day of, 19.., requested to deliver such chattel mortgage to plaintiff, he refused so to do.

WHEREFORE the plaintiff demands judgment that the defendant execute and deliver to the plaintiff a chattel mortgage on said goods, pursuant to said contract; and that the plaintiff have such further relief as may be just, with the costs of this action.

1144. By lessee for specific performance of an agreement to lease real estate.

I. That on the day of, 19.., the defendant was and still is the owner of the following described premises [*insert description*] and that on said day the plaintiff and defendant entered into a written agreement whereby the said defendant agreed to lease said premises to the plaintiff for the term of years from, 19.., at the annual rental to be paid by plaintiff of the sum of dollars, to be paid on the day of in each year [*or attach copy of the lease as an exhibit to complaint*].

II. That in reliance upon said agreement the plaintiff on or about the day of, 19.., repaired and improved the dwelling house upon said premises at an expense of dollars [*or state other acts done in reliance upon the agreement in accordance with the facts*].

III. That plaintiff has duly performed all the conditions of said agreement on his part to be performed, and has always been and now is ready and willing to accept a lease of said premises, and on the day of, 19.., duly tendered to the defendant the rent of said premises for the first year, and requested that defendant execute a lease thereof according to the terms of said agreement, but that defendant refused and still refuses to make such agreement.

IV. That by reason of the premises, the plaintiff has no adequate remedy at law for the breach of said agreement by the defendant.

WHEREFORE plaintiff demands judgment that the said defendant be required to specifically perform said agreement

and execute and deliver the said lease, and that plaintiff have such further relief as may be equitable, and for the costs of this action.

1145. For specific performance of an agreement to execute a chattel mortgage on personal property, and to set aside fraudulent disposition of the property (adapted from *St. John v. Griffith*, 2 Abb. Pr. 198).

I. That on the day of, 19.., the plaintiff being the owner of the following described property [*describe property*] on said day entered into an agreement with the defendant C.... D.... whereby said plaintiff agreed to sell and deliver the same to the defendant C.... D.... for the sum of dollars, one-half of which said C.... D.... agreed to pay on the delivery of said property, and the remainder in months from the date thereof, and to give a mortgage on said property to the plaintiff to secure the payment of said sum of dollars.

II. That in pursuance of said contract the plaintiff on said day delivered said goods to the defendant C.... D.... and received from him the sum of dollars, being one-half of the price thereof, but said defendant did not deliver to plaintiff a mortgage upon said goods to secure the amount remaining unpaid thereon, as provided in said agreement.

III. That on the day of, 19.., the plaintiff requested the defendant C.... D.... to execute and deliver said mortgage to the plaintiff, which he then refused to do, and still refuses.

IV. That on the day of, 19.., the defendant C.... D.... with intent to defraud the plaintiff and deprive him of his security, made, executed and delivered to the defendant E.... F.... without consideration, a chattel mortgage in form covering the said property, and that the said E.... F.... then and there knew of the said agreement between the plaintiff and the defendant C.... D.... and accepted said mortgage with intent to assist said C.... D.... in defrauding the plaintiff, and that the said E.... F.... has caused said mortgage to be duly filed in the office [*state proper office*] and now claims to hold the same as a valid and subsisting lien upon said property [*or state other facts showing inadequacy of the remedy at law*].

WHEREFORE plaintiff demands judgment that the said defendant C.... D.... be required to specifically perform his said agreement, and to execute and deliver to the plaintiff a chattel mortgage upon said property in accordance with said

agreement, and that the said mortgage given to the defendant E.... F.... be adjudged fraudulent and void as against the plaintiff and for such other relief as may be equitable, with costs.

1146. To enforce specific performance of an agreement by a railroad to construct a farm crossing.

I. [*Allege corporate character of defendant, as in Chapter XIX.*]

II. That on the day of, 19.., the defendant had located its railroad across the [*describe premises*] which premises were and still are the farm of the plaintiff, on which he resides, and on said day the plaintiff and defendant entered into an agreement in writing for the right of way of said railroad across said premises, and for a farm crossing, of which a copy is attached hereto, made part of this complaint, and marked Exhibit A.

III. That in pursuance of said agreement the plaintiff on the day of, 19.., executed and delivered to said defendant a deed of said right of way, but which deed contained no reference to the agreement for a farm crossing.

IV. That on or about the day of, 19.., the defendant completed the construction of its railroad across said land, but failed to construct a farm crossing over its said railroad, whereby it has been made impossible for the plaintiff to drive his stock across said track, and whereby also one part of plaintiff's said farm has been and is severed from the other part thereof.

V. That on the day of, 19.., the plaintiff requested the defendant, through its proper officers, to construct such crossing, but it then refused and still refuses to do so.

VI. That the plaintiff is the owner of head of cattle [*or state what stock*] which he keeps on said farm, and it is necessary each day to drive said cattle to the pasture across said railroad, but in consequence of the breach of said agreement he is compelled daily to drive his cattle one mile out of a direct route, and has sustained damages in the sum of dollars [*or state other facts showing the inadequacy of the remedy at law*].

WHEREFORE plaintiff demands judgment that the defendant be required to specifically perform its said agreement and construct said crossing, and that the plaintiff recover his damages aforesaid, and have such further relief as may be equitable, with costs.

CHAPTER LXVII.

COMPLAINT TO ENFORCE VENDOR'S LIEN.

1147. By vendor against purchaser, and his grantee and judgment creditors, to enforce lien for purchase money.

In most states a vendor of real estate has an equitable right to a lien upon the land sold for unpaid purchase money. It is rather an equitable right to acquire a lien by action than a lien itself. It is defeated by conveyance of the land by the vendee to an innocent purchaser without notice as well as by the acceptance by the vendor of securities upon other property in addition to the vendee's personal obligation. *Berger v. Berger*, 104 Wis. 282; *Willard v. Reas*, 26 Wis. 540; Iowa Code sec. 2924; *Kendrick v. Eggleston*, 56 Iowa, 128; *Bray v. Booker* (N. Dak.), 79 N. W. 293. The right is also extended generally to a third person who had advanced all or a part of the purchase money expressly for the purpose. *Carey v. Boyle*, 53 Wis. 574. In North and South Dakota these principles are embodied in statutes. N. Dak. Rev. Codes secs. 4830-4834; S. Dak. Rev. Civ. C. secs. 2148-2152.

1147. By vendor against purchaser, and his grantee and judgment creditors, to enforce lien for purchase money.

I. That the plaintiff, being owner in fee [*or otherwise*] of the real property hereinafter described, did on the day of, 19.., sell the same to the defendant [*naming purchaser*] for the sum of dollars, and thereupon by his deed conveyed the same to the defendant [in fee] which premises are [bounded and] described as follows [*full description, as in deed*].

II. That the said [*purchaser*] has paid the plaintiff dollars, part of said purchase money [*and state what security if any was given for the rest, e. g., thus:*] and on the day of, 19.., gave to the plaintiff his promissory note for dollars, the residue thereof, payable on the day of, 19..; but that no part [of said note or] of the residue of said purchase money has been paid, though on the day of, 19.., the plaintiff duly demanded the same of said [*purchaser*].

III. That the said [*purchaser's grantee*] purchased of the [*purchaser*] a portion of said premises, with the full knowledge that the said [*purchaser*] had not paid the balance of said purchase-money, and took a conveyance from the said [*purchaser*] to him for the said premises so by him purchased of the said [*purchaser*].

IV. That the said [*judgment creditor*] claims to have recovered judgment against the said [*purchaser*] for about dollars, on the day of, 19.., in the court, and has caused execution to be issued thereon, and is proceeding to sell the part of said premises not sold to the said [*purchaser's grantee*]; whereby the said plaintiff will wholly lose the balance of the said purchase money, as the said [*purchaser*] is wholly insolvent, and unable to pay the same.

WHEREFORE the plaintiff demands judgment, that the plaintiff be adjudged to have an equitable lien upon said lands for the unpaid purchase price thereof aforesaid, and that such lien be adjudged to be superior to the liens or interests of the defendants in said lands, and that the said defendants be barred and foreclosed of all right, lien or equity of redemption in said lands, and that the same be sold under the direction of this court, and the plaintiff be paid the amount of said lien out of the proceeds of such sale, together with the expenses of such sale and the costs of this action, and that in case of deficiency the plaintiff have judgment against the defendant [*purchaser*] for the amount thereof, and for such further relief as may be equitable.

CHAPTER LXVIII.

COMPLAINTS TO ENFORCE MECHANICS' LIENS.

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| 1148. Complaint for foreclosure of mechanic's lien; contractor against owner and other lien claimants. | 1156. For foreclosure of mechanic's lien, general form (Iowa). |
| 1149. The same, for reasonable value of materials sold or labor furnished to owner. | 1157. For foreclosure of mechanic's lien, general form (North Dakota and South Dakota). |
| 1150. By employee of principal contractor against owner and principal contractor. | 1158. For foreclosure of mechanic's lien: contractor against owner, general form (Nebraska). |
| 1151. By several employees against principal contractor and owner. | 1159. The same, where subsequent lien-holders or incumbancers are joined (Nebraska). |
| 1152. Allegations of assignment of lien. | 1160. By subcontractor against principal contractor and owner (Nebraska). |
| 1153. For foreclosure of mechanic's lien: contractor against owner, general form. | 1161. Allegation of fraudulent lien. |
| 1154. The same, by employee of principal contractor. | |
| 1155. The same, for materials furnished to owner. | |

Mechanics liens and actions to enforce them are creatures of the statutes of the various states. While these statutes are quite similar there are many substantial differences in details. In drawing a complaint close attention should be paid to the statute of the particular state, and care should be taken to state clearly every fact made necessary by that statute to the perfecting of a lien prior to action.

1148. Complaint for foreclosure of mechanic's lien: contractor against owner and other lien claimants (Wis. Stats. 1898 sec. 3322).

I. That the plaintiff is now and was at the times hereinafter stated a contractor and builder doing business as such at the of state of Wisconsin, and that as such contractor and builder * on or about the day of, 19.., he entered into an oral [*or written*] contract with the defendant [*owner*] whereby he agreed to construct and erect, and furnish all the materials for [*or to do all the carpenter work and fur-*

nish all the materials therefor in and about] the construction and erection of a certain dwelling house for the said defendant [owner] upon [describe premises] for the sum of dollars to be paid by the said [owner] upon the completion of the said building. [Or, a true copy of which contract is hereto annexed, made part of this complaint, and marked Exhibit A.]

II. That in pursuance of said contract and in full accordance with the terms thereof the plaintiff, on and between the day of, 19.., and the day of, 19.., erected and constructed said building [or performed all the carpenter work in the construction of said building] upon the premises aforesaid and furnished all the materials therefor and duly performed all the conditions of said contract on his part to be performed.

III. That the said [owner] was at the dates hereinbefore mentioned and still is the owner in fee of the premises hereinbefore mentioned, and that the said premises are [situated within the incorporated city of in said state and do not exceed one acre in extent] [or, not situated within the limits of any incorporated city or village, and do not exceed forty acres in extent.] [Wis. Stats. 1898 sec. 3314 subd. 7.]

IV. That the last date upon which said work and labor of constructing said building was performed, and said materials were furnished is the day of, 19.., and that said plaintiff duly filed, as required by law, his claim for a lien for the amount due and owing him as aforesaid, from said defendant, in the office of the clerk of the circuit court of the county of on the day of, 19.., and within six months from the time of the doing of said work, and the furnishing of the building materials aforesaid, which claim for a lien so filed was duly signed by the claimant [or by L.... M.... the attorney of the claimant] and contained a statement of the contract or demand on which it is founded, the name of the person against whom the demand is claimed, the name of the claimant or assignee, the last date of the performance of labor or furnishing of materials, a description of the property affected thereby, a statement of the amount claimed, and all other material facts in relation thereto, a copy of which claim is hereto annexed and made part of this complaint, and marked Exhibit B.

V. That one year has not elapsed since the doing of said work and labor, and furnishing of the building materials aforesaid, and the commencement of this action; that no part of the contract price has been paid except the sum of dollars; that there is now due to and owing the plaintiff from said de-

fendant on account of said contract, and the performance of said labor and furnishing of said materials, the sum of dollars, with interest from the day of, 19..

VI. That the defendant [*other lien claimant*] has filed a claim for a lien upon the premises aforesaid, for the amount of dollars and costs, which claim was filed in the office of the clerk of the circuit court for the county of aforesaid on the day of, 19.., for [*state whether for materials or labor*] and that no other claim for liens on said premises have been filed.

VII. That the defendants [*subsequent purchasers, or lien holders*] have or claim to have some interest in or lien upon the said premises, which interest or lien, if any, is subsequent and subject to the lien of the plaintiff.

VIII. That the relation of landlord and tenant did not exist between the plaintiff and the defendants or either of them at any of the times hereinbefore mentioned.

WHEREFORE plaintiff demands judgment that the demands of all persons having filed claims for liens upon the premises aforesaid, whether plaintiffs or defendants, be ascertained and adjudged, and that the interest of [*owner*] the person owning said premises at the time of the commencement of the work and furnishing of the materials aforesaid upon the premises hereinbefore described, of, in and to the premises aforesaid, or the interest therein which said [*owner*] or any person claiming under him has since acquired, be sold to satisfy the amount of the liens so ascertained and adjudged, with the costs of this action, and that in case of deficiency arising upon such sale then that upon confirmation thereof the plaintiff recover judgment for such deficiency against [*defendants personally liable*] and have execution therefor, and for such further relief as may be just and equitable.

1149. The same, for reasonable value of materials sold or labor furnished to owner (Wisconsin).

1. [*As in last preceding form to the **] on and between the day of, 19.., and the day of, 19.., at the special instance and request of the defendant [*owner*] and upon his promise to pay the reasonable value thereof, the plaintiff performed work and labor and furnished certain lumber and other building materials to the defendant in and about the erection, construction and repair of a certain dwelling house owned by the said defendant [*owner*] and situated upon the following described premises [*insert description*] which labor and materials were of the reasonable value of dollars,

a true statement and account of which labor and materials so performed and furnished is hereto attached, made part of this complaint, and marked Exhibit A.

[*Omit paragraph II of the preceding form, and proceed thereafter as in said form, making such incidental changes as may be necessary.*]

1150. By employee of principal contractor against owner and principal contractor (Wis. Stats. 1898 secs. 3315-3322; Laws of Wis. 1903 c. 298).

I. That on or about the day of, 19.., the defendants [*owner and principal contractor*] entered into a certain contract whereby the said [*principal contractor*] agreed to construct [*set forth contract as in allegation I of Form 1148*].

II. [*Allege performance of contract by principal contractor as in allegation II of Form 1148.*]

III. [*As in allegation III of Form 1148.*]

IV. That the plaintiff is a carpenter, and on or about the day of, 19.., the said defendant [*principal contractor*] employed the plaintiff to perform work, labor and services as such carpenter, in, and upon the building and construction of said dwelling house, and agreed to pay the plaintiff at the rate of dollars per day for such labor, and that under said agreement the plaintiff performed work and labor as carpenter in and about the erection and construction of said building on and between the day of, 19.., and the day of, 19.., for days, whereby the said [*principal contractor*] became indebted to the plaintiff in the sum of dollars, which sum has not been paid, nor any part thereof, and still remains justly due to the plaintiff.

V. That the last date of the performance of the said work and labor upon said building by the plaintiff under his said employment is the day of, 19...

VI. That on the day of, 19.., the plaintiff gave notice in writing to the said defendant [*owner*] the owner of the property to be affected by such lien, setting forth therein that he, the plaintiff, had been employed by said defendant [*principal contractor*] to perform work and labor upon, in and about the construction of such building, and had, as such carpenter, actually performed work, labor and services thereon for the period of days, at the agreed price of dollars per day; that the same had been performed in and between the day of, and the day of, in the year 19.., and that the amount due to the plaintiff was the sum of dollars, and that the plaintiff claimed the lien there-

for given by Chapter 143 of the Wisconsin Statutes for the year 1898, and the acts amendatory thereof; and that such notice was given by delivering the same to said defendant [*owner*] personally and leaving the same with him [*or by filing the said notice in the office of the clerk of the circuit court of said county of and that neither said (owner) nor his agent could be found in said county*].

VII. That thereafter and on the day of, 19.., and within six months from the date of the last charge for performing said work and labor, the plaintiff duly filed as required by law, his claim for a lien upon said building and said lot above described, in the office of the clerk of the circuit court of county, containing a statement of the contract and demand upon which it is founded, and the name of the person against whom the demand is claimed, the name of this claimant, the last date of the performance of labor, as above stated, a description of the property affected thereby, a statement of the amount claimed, and all other material facts in relation thereto, a copy of which claim is attached hereto and made part of this complaint, and marked Exhibit A; and that one year has not elapsed since the date of the last charge for work and labor as aforesaid.

VIII. That no other claims for liens on said premises have been filed [*or allege the filing of other claims as in allegation VI of Form 1148.*]

IX and X. [*As in allegations VII and VIII of Form 1148.*]

WHEREFORE [*demand for judgment as in Form 1148.*]

1151. By several employees against principal contractor and owner (Wis. Stats. 1898 sec. 3321).

I, II and III. [*As in Form 1150.*]

IV. That on or about the day of, 19.., the plaintiffs were severally employed by the defendant [*principal contractor*] to perform work and labor in and about the construction of said building, and that each of said plaintiffs did thereafter perform such labor as hereinafter particularly alleged, and that the facts relative to the claim of the plaintiff A.... B.... are as follows:

V. [*Here state facts as to claim of A.... B.... as in allegations IV, V, VI and VII of Form 1150.*]

VI. That the facts relative to the claim of the plaintiff C.... D.... are as follows [*state the facts, as in case of A.... B....*]

VII. [*Follow allegations VIII, IX and X of Form 1150.*]

VIII. That the allegations of this complaint relative to each

plaintiff's claim and cause of action herein are made by him upon his personal knowledge; and as to the other allegations thereof, he makes the same upon information and belief.

WHEREFORE, etc. [*as in Form 1148.*]

[*To be verified by all plaintiffs, as they are not joined in interest.*]

1152. Allegations of assignment of lien (Wis. Stats. 1898 sec. 3316).

That the said [*original claimant*] on or about the day of, 19.., and before the commencement of this action, duly assigned and transferred to the plaintiff all his right, title and interest in or to the said claim for the said work, labor and materials, and in and to the said lien upon said premises; and the said plaintiff now is the lawful owner and holder thereof.

That on the day of, 19.., and within fifteen days after said assignment was made, this plaintiff gave to said defendant [*owner*] notice in writing of such assignment, by serving such notice in writing, together with a copy of such assignment on him personally on that day, and leaving the same with him.

1153. For foreclosure of mechanic's lien: contractor against owner, general form (Minn. Rev. Laws 1905 sec. 3513).

I. That the plaintiff is and was at the dates hereinafter mentioned a contractor and builder, and that on or about the day of, 19.., plaintiff and defendant [*owner*] entered into a contract whereby the plaintiff agreed to construct a dwelling house for said defendant upon the premises hereinafter described and furnish all materials therefor, and the defendant [*owner*] agreed to pay plaintiff upon completion thereof the sum of dollars [a copy of which agreement is hereto attached, made part of this complaint, and marked Exhibit A].

II. That the plaintiff has constructed said dwelling house in accordance with said contract, and has duly performed all the conditions of said contract on his part to be performed.

III. That the premises upon which said dwelling house was built by the plaintiff under said contract are described as follows [*insert accurate description*].

IV. That at the time of the making of said contract the defendant [*owner*] was and still is the owner in fee of said premises.

V. That the defendant [*owner*] has failed and neglected to pay the plaintiff any part of the contract price of said dwelling house, except the sum of dollars paid on the day

of, 19.., and that there is now due and owing the plaintiff from the defendant the sum of dollars with interest from, 19..

VI. That the plaintiff began to furnish materials and perform labor in the erection and construction of said dwelling house under the terms of said agreement on the day of, 19.., and thereafter continued to perform labor and furnish materials therefor until and including the day of, 19.., on which day said building was completed. and that a true bill of particulars of all of said materials and labor is hereto attached, made part of this complaint, and marked Exhibit A.

VII. That on the day of, 19.., and within ninety days after the last item of said labor and materials was so performed, furnished and delivered, and plaintiff filed for record, in the office of the register of deeds in and for the county of state of Minnesota, a verified lien statement, a copy of which is hereto attached, marked Exhibit B, and made part of this complaint.

VIII. That the defendants W.... X.... and Y.... Z.... have lien claims of record upon said premises for materials furnished for or labor performed upon said dwelling house.

WHEREFORE plaintiff demands judgment against the defendant [*owner*] for the sum of dollars, with interest thereon from the day of, 19.., and adjudging the same a lien upon said premises; also determining and adjudging the amount and validity of the lien claims of defendants [*other lien claimants*] and adjudging and directing a sale of said premises and the application of the proceeds thereof to the payment of the claims herein adjudged liens thereon, and the costs and disbursements of this action; and for such further relief as may be just and equitable.

1154. The same, by employee of principal contractor (Minnesota).

I. That on or about the day of, 19.., the defendants [*principal contractor and owner*] entered into a contract whereby [*allege contract as in allegation I of Form 1153*].

II. That between and including the day of, 19.., and the day of, 19.., the plaintiff, at the special instance and request of the defendant [*principal contractor*] and upon his promise to pay therefor the sum of dollars per day [*or its reasonable value*] performed for the said defendant [*principal contractor*] work, labor and services in and about the erection and construction of said building, and in accordance with the said agreement between the de-

fendants [*principal contractor and owner*] the nature, amount and value of which are specifically set forth in the bill of particulars attached hereto and made part of this complaint, and marked Exhibit A.

III. That the amount of the said work, labor and services so performed by plaintiff [*or, the reasonable value of said work, labor and services*] is the sum of dollars, no part of which sum has been paid except the sum of dollars.

IV. That said work, labor and services were performed in and about the erection and construction of the said dwelling house upon the following described premises [*insert description*] and that at the time the said work, labor and services were performed the said [*owner*] was and still is the owner in fee of said premises.

V and VI. [*As in allegations VII and VIII of last preceding form.*]

WHEREFORE [*demand for judgment as in last preceding form.*]

1155. The same, for materials furnished to owner (Minnesota).

I. That on and between the day of, 19.., and the day of, 19.., the plaintiff sold and delivered to the defendant certain building materials, the nature, quality and value of which are specifically set forth in the bill of particulars hereto attached, marked Exhibit A, and made a part of this complaint.

II. That said materials were reasonably worth dollars [*or, that said defendant then promised to pay for the same dollars on or before the day of, 19..*]

III. That no part thereof has been paid [*except, etc.*]

IV. That said materials were so sold and delivered to be used, and were in fact used in the construction of a dwelling house upon the following described premises [*insert description*] and that at the time said materials were so sold and delivered the defendant was and still is the owner in fee of the said premises.

V and VI. [*As in allegations VII and VIII of Form 1153.*]

WHEREFORE [*demand for judgment as in Form 1153.*]

1156. For foreclosure of mechanic's lien, general form (Iowa Code sec. 3089 et seq.)

[*In Iowa either of the last preceding forms given for use in Minnesota may be substantially followed, substituting for the allegation as to the filing of the claim the following*]:

That on the day of, 19.., the plaintiff duly filed

in the office of the clerk of the district court of county, Iowa, a duly verified statement and account of the said demand due to the plaintiff, after allowing all credits thereon, which statement set forth the time when such materials were furnished [*or, such labor was performed, or both*] and when the same was completed and contained a correct description of the said real estate to be charged with such lien, a true copy of which verified statement is hereto attached, made part of this petition, and marked Exhibit A [*add if the plaintiff be a subcontractor*] and that on the day of, 19.., the plaintiff duly served upon the defendant [*owner*] [*or, upon L.... M.... the agent of said owner*] a written notice subscribed by the plaintiff, of the filing of the plaintiff's said claim and statement as aforesaid, by delivering such notice to and leaving the same with the said [*owner or agent*], a true copy of which notice so served is attached hereto, and made a part of this petition, and marked Exhibit B.

[*Allege assignment, if any, as in Form 1152.*]

WHEREFORE the plaintiff demands judgment against said defendant [*owner*] for the said sum of dollars with interest and costs, and prays that his mechanic's lien be established and enforced against the building and land aforesaid, as provided by law; that the lien, if any, of each and all of the defendants in this action to the real estate above described be decreed to be junior and inferior to the plaintiff's said lien thereon, and that the equity of redemption of each and all of said defendants be forever barred and foreclosed, and that special execution issue for the sale of said premises, or so much thereof as may be necessary to satisfy said judgment, interests and costs, and for such other relief as may be equitable in the premises.

1157. For foreclosure of mechanic's lien, general form (N. Dak. Rev. Codes sec. 4788 et seq.; S. Dak. Rev. Code C. P. sec. 696 et seq.)

[*In the states of North and South Dakota the forms previously given in this chapter for use in Minnesota may be substantially followed, substituting for the allegation of the filing of the statement of lien the following*]:

That on the day of, 19.., and within ninety days [*in South Dakota, four months*]-after the furnishing of all of the said materials [*or the performing of said labor, or both*] the plaintiff duly filed in the office of the clerk of the court of the county of in said state a just and true account of the demand so due to the said plaintiff, after allowing

all credits thereon, which account contained a correct description of the said real estate to be charged with such lien, and was duly verified by the affidavit of this plaintiff.

WHEREFORE the plaintiff demands judgment against the defendant [*owner or principal contractor*] for the sum of dollars, with interest from, 19.., and for the costs of filing his said claim, as well as the costs of this action, and that the same be adjudged to be a lien upon the said real estate and dwelling house herein described, and upon all the right, title and interest of the said [*owner*] therein; that the rights and interests of the defendants [*all other lien claimants or incumbrancers*] be ascertained and determined [and that the same be adjudged to be subject to the plaintiff's said lien]; that the said premises and dwelling house be adjudged to be sold, and that the proceeds be applied to the payment of the plaintiff's said demand and costs, as well as to the payment of the other liens which may be ascertained and adjudged herein [*in North Dakota omit prayer for personal judgment at beginning, and insert:* and that the plaintiff have judgment for any deficiency which may arise upon such sale against the defendant, *the owner*]; and that the plaintiff have such other and further relief as may be just and equitable.

1158. For foreclosure of mechanic's lien, contractor against owner, general form (Cobbey's Ann. Stats. of Nebr. sec. 7100 et seq.).

I. That on or about the day of, 19.., the plaintiff entered into an oral [*or written*] contract with the defendant [*owner*] to furnish him fifty thousand brick, at dollars per thousand, for the construction and erection of a dwelling house, a copy of which contract is attached hereto, made part of this petition, and marked Exhibit A.

II. That the plaintiff furnished and delivered said brick to the defendant for the erection of said house, on and between the day of, 19.., and the day of, 19.., and that there is now due to the plaintiff therefor the sum of dollars, no part of which sum has been paid.

III. That the defendant [*owner*] at the time the plaintiff furnished said brick was the owner in fee of said lot. [*Or otherwise state defendant's title.*]

IV. That on the day of, 19.., and within four months from the time of furnishing said materials, the plaintiff made an account in writing of the items of such materials furnished the defendant under said contract, and after making oath thereto as required by law, filed the same in the office of the

register of deeds of county, and claiming a mechanic's lien therefor upon said lot and the building thereon.

WHEREFORE the plaintiff demands judgment against the defendant [*owner*] for the sum of dollars, with interest from the day of, 19.., and costs of suit, and that said premises may be sold, and the proceeds thereof applied to the payment of said judgment, interest and costs, and for such other and further relief as may be just and equitable.

1159. The same, where subsequent lien-holders or incumbrancers are joined (Nebraska).

[Insert in the preceding form the following]:

V. Upon information and belief, that the defendant [*other lien claimant*] has or claims to have a mechanic's lien upon said premises for the sum of dollars, filed on the day of, 19.., and that on the day of, 19.., the said defendant [*owner*] made and executed a mortgage upon said premises to the defendant [*subsequent mortgagee*] to secure the payment of dollars, which mortgage is subsequent and subject to the lien of the plaintiff.

[Add to the prayer for judgment]: that the interests or liens, if any, of the defendants [*subsequent lien-holders or mortgagors*] be adjudged to be subsequent and subject to the lien of the plaintiff, etc.

1160. By subcontractor against principal contractor and owner (Nebraska).

I. That on the day of, 19.., the defendant [*owner*] was the owner of certain real estate described as follows [*describe in full*] in county, and on said day said [*owner*] entered into a contract with defendant [*principal contractor*] to erect a building on said land, a copy of which contract is attached hereto and marked Exhibit A [*or state contract according to legal effect*].

II. That on the day of, 19.., the said [*principal contractor*] employed the plaintiff to work on said building for the sum of dollars per day, and he thereupon performed days' labor thereon, in pursuance of said employment, the last day of said labor being the day of, 19...

III. That on the day of, 19.., and within sixty days from the date of the performance of said labor, the plaintiff notified said [*owner*] of the amount owing to him by said [*principal contractor*] and requested him to pay the same, which he has failed to do. That thereupon on said day the

plaintiff made an account in writing of the items of said labor performed for said [*principal contractor*] on said building under said contract, and after making oath thereto, as required by law, filed the same in the office of the register of deeds of county, claiming a mechanic's lien therefor upon said lot and the building thereon.

IV. That no part of said debt has been paid either by the said [*principal contractor*] or the said [*owner*] and there is now due and owing by said defendants to the plaintiff the sum of dollars, with interest from the day of, 19..

WHEREFORE the plaintiff demands judgment against the defendants for the sum of dollars with interest from the day of, 19.., and costs of suit, and that said premises may be sold and the proceeds applied to the payment of said judgment, interests and costs; and for such other relief as may be just and equitable.

1161. Allegation of fraudulent lien.

[Insert in any of the foregoing forms, if the facts warrant, and it is desired to obtain a judgment setting aside the fraudulent lien]:

That on the day of, 19.., the defendant [*fraudulent lien-holder*] at the instance and request of the defendant [*owner*] and with intent to defraud the plaintiff, filed a claim for lien against said [*owner*] and upon said premises, for the sum of dollars. That said claim is fraudulent and void, and that said defendant [*owner*] is not indebted to said E.... F.... in any way whatever for labor, skill or materials furnished by him for the erection [*or repair*] of said dwelling house, and said [*fraudulent lien-holder*] has no valid lien thereon and that said lien, if permitted to remain in force, will greatly diminish or wholly defeat the lien of the plaintiff.

[Add to demand for judgment]: That said apparent lien of said defendant E.... F.... may be declared fraudulent and void, and set aside, etc.

CHAPTER LXIX.

COMPLAINTS FOR PARTITION.

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| 1162. Complaint for partition, general form. | 1168. Complaint for partition, setting forth sources of title. |
| 1163. Allegation of unknown owners. | 1169. Petition for partition (Iowa). |
| 1164. Allegation of dower interest. | 1169a. Complaint in action for partition of a water power (Wis. Stats. 1898 sec. 3149; condensed and adapted from precedent sustained in <i>Clarke v. Stewart</i> , 56 Wis. 154). |
| 1165. Allegation of judgment lien on undivided shares. | |
| 1166. Allegation of mortgage lien on undivided share. | |
| 1167. Allegation of receipt of rents and profits by cotenants. | |

The action of partition is statutory and the statutes of the various states differ somewhat in details. Generally, however, it may be said that partition actions are simply proceedings of an equitable nature brought by one joint tenant in common who is in possession, actual and constructive, of lands, against his cotenants to obtain division of the lands or a sale and division of the proceeds in case the property can not be divided without great prejudice to the interests of the owners. All parties having interests or liens upon the premises, or upon the share of any tenant, should be made parties to the action. The complaint should describe the lands sought to be divided, and state specifically the interest which each party plaintiff and defendant has in them, and pray for partition. It is not an action in which disputed titles are to be settled, and if it appear that title is in dispute between plaintiff and defendant, the action will either be dismissed without prejudice, or stayed until the plaintiff establish his title at law. *Deery v. McClintock*, 31 Wis. 195; *Seymour v. Ricketts*, 21 Nebr. 240. In Wisconsin the plaintiff must be a cotenant in possession, actual or constructive; the action cannot be brought by a remainder man. Wis. Stats. 1898 sec. 3101; *Pabst Co. v. Melms*, 105 Wis. 441. Under the Minnesota statute the action may be brought by a remainder man not in possession or entitled to present possession. Minn. Rev. Laws 1905 sec. 4392; *Cook v. Webb*, 19 Minn. 167. The statutes of North and South Dakota in terms authorize the action to be

brought by only one of several tenants in possession. N. Dak. Rev. Codes sec. 5795; S. Dak. Rev. Codes C. P. sec. 587. In Iowa the action is regulated by the Codes secs. 4240 *et seq.*, and in Nebraska by Cobbey's Ann. Stats, of Nebr. secs. 1750 *et seq.*

1162. Complaint for partition, general form.

I. That the plaintiff and the defendants, own and possess as joint tenants [*or, as tenants in common*] the following described premises [*particular description of the premises*]; and that the plaintiff is desirous of a partition of the same.

II. That the plaintiff has an estate of inheritance therein of one undivided one-third interest in the fee thereof [*or other estate*].

III. That each of the defendants [*cotenants*] have a similar estate of one undivided one-third interest in the same [*or otherwise*].

IV. That the above described lands are all the lands in this state in which the parties to this action own any estate either jointly or in common, and that as plaintiff is informed and believes, no other persons have any interest or estate in the lands hereinbefore described.¹

WHEREFORE the plaintiff demands judgment for a partition of the said premises, according to the respective rights of the parties interested therein, and for a sale thereof, if it shall appear that a partition thereof can not be made without great prejudice to the owners thereof, and that the proceeds of such sale may be brought into court and divided among the parties, according to their respective rights and interests, and for the costs of this action; and for such further relief as may be equitable.

1163. Allegation of unknown owners.

That one M.... N.... in his lifetime, had an estate of inheritance therein of one undivided one-fourth interest in the fee [*or otherwise*] and that the said M.... N.... several years since removed from this state to; that he subsequently married and had children, some of whom are now living; but their names and places of residence are wholly unknown to the plaintiff, and although he has made diligent inquiries for that purpose, he cannot ascertain the same, or either of them. That said M.... N.... and his said wife are now dead; and that

¹ By Wis. Stats. 1898 sec. 3102 as amended by Laws 1899 c. 366, if the complaint does not ask partition of all the lands owned by

the parties either of them may have the complaint so amended as to affect all the lands so owned.

the children and heirs, or the heirs at law of any who may be dead, are collectively entitled to the undivided one-fourth part of said premises to which the said M.... N.... would be entitled, if living.

1164. Allegation of dower interest.

That the defendant [*dowress*] is the widow of one X.... Y...., the father of the said [*cotenants*] from whom they inherited said premises; and, as such widow, claims a right of dower which has not been admeasured in [the following described part of] said premises.

1165. Allegation of judgment lien on undivided share.

That the defendant [*judgment creditor*] holds a judgment recovered by him [*or, by one M.... N.... and thereafter duly assigned to him*], duly given in the court [*or, in an action before O.... P.... justice of the peace in and for the town of*] on or about the day of, 19.., against [*one or more of the cotenants*] for the sum of dollars; which judgment was, on the day of, 19.., docketed in said county of [*county where the premises are situated*] and remains unpaid and unsatisfied of record.

1166. Allegation of mortgage lien on undivided share.

That the defendant [*mortgagee*] holds a mortgage upon the said interest of [*one of the cotenants*] for dollars, payable on the day of, 19.., with interest from the day of, 19..

1167. Allegation of receipt of rents and profits by cotenants.

That during the time this plaintiff and said defendants have owned the said premises jointly [*or, in common*] to-wit, since the day of, 19.., the defendant E.... F.... has received all of the rents and profits thereof, amounting to the sum of dollars, as the plaintiff is informed and believes, and that on the day of, 19.., the plaintiff requested the said E.... F.... to account to him [*this plaintiff*] for the rents and profits so received and pay the said plaintiff his proper share thereof, which the said E.... F.... refused to do.

[*Add to prayer for judgment in first form in this chapter*]: and that the defendant E.... F.... be required to account for and pay over to the plaintiff the rents and profits aforesaid, so wrongfully retained by him, etc.

1168. Complaint for partition, setting forth sources of title.

I. That on or about the day of, 19..., C.... B...., being the owner in fee of the real property hereinafter described, died intestate as to the same, which real property is described as follows [*give description*].

II. That the said C.... B.... left W.... B...., his widow, one of the defendants, who is entitled to dower in said premises.

III. That subject to said dower the premises descended to the following named persons, the only heirs of the said deceased:

- (1) The plaintiff, A.... B...., who is a son of said C.... B.... deceased;
- (2) The defendant E.... B...., a daughter of the said C.... B...., deceased, and wife of one L.... B.... of county, in the state of
- (3) The defendants F.... M.... and G.... M...., minor children of one F.... B...., a daughter of said C.... B...., deceased. The said F.... B.... intermarried with the defendant H.... M...., and afterwards died intestate, leaving issue of said marriage F.... M.... and G.... M...., her only children and heirs, who reside in the county of and for whom their father H.... M...., who resides in county, has been duly appointed guardian by the court of said county. The said H.... M.... is tenant by the curtesy of the estate of said children.
- (4) G.... B...., son and only heir of one H.... B...., deceased. The said H.... B.... was a son of said C.... B...., deceased. The said G.... B...., after said estate was cast upon him by descent as aforesaid, conveyed his estate in said premises, by deed duly executed, to the defendant X.... Y.... who resides in

IV. The parties above named have now the following undivided estate in said premises:

- (1) The plaintiff, one undivided fourth in fee;
- (2) The defendant E.... B...., one undivided fourth in fee;
- (3) The defendants F.... M.... and G.... M...., each one undivided eighth in fee, subject to the curtesy of their father, H.... M....
- (4) The defendant X.... Y...., one undivided fourth in fee.

V. *[Add such further allegations as to liens, and judgments, or otherwise, from the forms previously given in this chapter, as the facts may call for.]*

WHEREFORE *[demand for judgment as in Form 1162.]*

1169. Petition for partition (Iowa).

[In Iowa an abstract of title must be attached to the petition, hence the following allegation should be inserted in the foregoing forms]:

The plaintiff attaches to this petition an abstract of the title relied upon by him, marked Exhibit A, and made a part thereof.

[It is the opinion of Mr. Kinne that under Iowa Code sec. 4185 it is advisable to state in the petition, when there are no parties under legal disability, that the parties are unable to agree upon a division of the property. 2 Kinne's Pl. & Pr. p. 418. If deemed necessary, this fact may be alleged as follows]:

That the several owners of said lands are unable to agree upon a division thereof.

1169a. Complaint in action for partition of a water power
(Wis. Stats. 1898 sec. 3149; condensed and adapted
from precedent sustained in *Clarke v. Stewart*, 66
Wis. 154).

I. That by Chapter of the private and local laws of Wisconsin for the year 19... , power and authority was duly given to *[name grantees]* to erect and maintain a dam across the river, at *[name place]* upon certain lands described as follows *[describe tracts on which dam rests]*, which lands were then owned by *[name owners]*.

II. That in pursuance of the power so granted, a dam with booms and piers was erected at said point in the year 19... , by means whereof a valuable water power was created which has ever since been used and enjoyed as hereinafter set forth.

III. That subsequently, by proper conveyances from said original owners the plaintiff and defendants became the owners in severalty, and entered into possession of the tracts of land upon which said dam is constructed, to-wit: the plaintiff owns and possesses *[here describe tract owned by plaintiff]*; the defendant C.... D.... owns and possesses *[describe tract]*; and the defendant E.... F.... owns and possesses, etc.

IV. That by sufficient and proper conveyances from said original grantors and their grantees, the plaintiff and the said defendants have become the owners of and are now possessed of said dam and of the entire water power produced by said dam,

and the rights and privileges granted by said act of the legislature, as follows, to-wit:

The plaintiff acquired and now possesses the right to use forever from said dam and water power sufficient water to drive one rotary saw and edger, one bull wheel, and to carry off from the pond the refuse floodwood that might accumulate, and an equal *pro rata* right to use the piers, booms, ponds, guardlocks, and dams, with other mills then or thereafter erected [*or otherwise describe the right according to the terms of the conveyance*].

The defendant C.... D.... acquired and now possesses the right [*here describe his right according to his conveyance, and so proceed with each separate right*].

V. That the plaintiff and defendants have severally erected mills below said dam, for the use of said water power and privileges, and that since the erection thereof great changes have taken place in the kind of water wheels used, requiring an increased quantity of water to propel the machinery; that the terms of said grants to the various parties, as above set forth, do not admit of accurate measurement of the water which may be used by each except by actual trial; that in times of low water, in the usual condition of the dams and locks, there is not sufficient water to run all of said mills to their full capacity; that during the present season there has at times been a scarcity of water; that the mills of said defendants C.... D.... and E.... F.... are located below the mills of the plaintiff on said river; so that when the water was low they have drawn down the head at the plaintiff's mill, thus making it impossible for the plaintiff to obtain water to which he is lawfully entitled as hereinbefore set forth, to the great damage of the plaintiff; that said defendants [*name them*] insist upon their right to run their mills aforesaid to the full capacity thereof night and day, notwithstanding it may take the plaintiff's water away from him, and that they intend and threaten to do so in violation of the plaintiff's rights in the premises; and that disagreements have arisen and still exist between the plaintiff and said defendants respecting their rights in said dam and said water power and respecting their obligations to repair said dam, booms and piers, by reason of the general terms used in conveying their respective rights and privileges.

VI. That the said dams, piers and booms connected with said water power are now in need of repair and improvement; that it is essential to the preservation and proper use of said power that the same be repaired without delay; and that the parties are unable to agree as to their respective obligations to

contribute to the expense of repairing said dam, and the care and management thereof.

WHEREFORE the plaintiff demands that the respective rights of the said parties in said water power be determined and adjudged, and that the actual quantity to which each is entitled under a given head may be ascertained and adjudged in the manner provided by law; that the respective obligations of the parties to contribute to the expense of repairs and maintenance of said dam be adjudged, and that the parties defendant may be restrained from using more than their just proportion, and from drawing down the water of said pond, or so much water therefrom as to prevent the plaintiff from the use and enjoyment of his due share thereof, and that the plaintiff have such further relief as may be just and equitable, and that he recover the costs and disbursements of this action.

CHAPTER LXX.

COMPLAINTS FOR ADMEASUREMENT OF DOWER.

1170. By widow, for admeasurement of dower.

In North and South Dakota estates in dower and by the curtesy have been abolished. N. Dak. Rev. Codes sec. 3743; S. Dak. Rev. Civ. C. sec. 1095. The same is true in Iowa, although the estate in fee given in its stead is still generally denominated dower. Iowa Code sec. 3366. In Wisconsin, Minnesota, and Nebraska the estate in dower is still recognized and regulated by the statutes. Doubtless courts of equity retain jurisdiction to assign dower to a widow where by law the estate still exists. However, as the statutes generally provide for the admeasurement by summary proceedings on petition to the probate court, it is probable that the following form will be of little practical use, as under ordinary circumstances the rule is general that courts of general jurisdiction will refuse to entertain actions when there is a complete and adequate remedy in the probate court.

1170. By widow, for admeasurement of dower.

I. That on or about the day of, 19.., the plaintiff intermarried with C.... D.... late of county, who afterward, on or about the day of, 19..,* departed this life intestate a resident of said county, leaving the plaintiff his widow, and E.... F.... and G.... H.... his children and only heirs at law, and that letters of administration were thereafter and on or about the day of, 19.., duly granted to the defendant J.... K.... upon the said estate, and that the said J.... K.... is still such administrator, duly qualified and acting. [*Or, if deceased left a will: *departed this life a resident of said county, leaving the plaintiff his widow, and a last will and testament, which was on the day of, 19.., duly admitted to probate by the court of county, and a copy thereof is attached hereto, made part of this complaint, and marked Exhibit A, and that letters testamentary thereon were duly granted by said court on the day of, 19.., to the defendant J.... K...., who is still such administrator duly qualified and acting.*]

II. That the said C.... D.... died seized in fee and possessed of the following described premises [*insert description*].

III. That upon the death of the said C.... D.... said lands and premises descended to the defendants E.... F.... and G.... H.... as heirs at law of the said C.... D.... [*or, were devised to the said E.... F.... and G.... H.... by the terms of said will*] subject to and charged with the right of dower of the plaintiff therein [*if provision for the widow is made by the will add: and that this plaintiff did, on the day of, 19.., duly elect in writing to accept the provisions made for her in lieu of dower by the terms of said will*].

IV. That the plaintiff, by reason of said marriage, upon the death of said C.... D.... became entitled to dower in the lands above described, which dower has never been assigned to her, nor has she received any equivalent therefor, or released the same.

V. That the said premises are in the possession of the defendant L.... M.... who claims some interest in or right to the possession thereof, or some part thereof, which right or interest, if any, is subject to the plaintiff's right of dower therein.

VI. [*State any facts showing that the remedy in the probate court is inadequate.*]

WHEREFORE plaintiff demands judgment establishing and adjudging her said right of dower in the real estate above mentioned and described, and that the same be set off and apportioned to her by reference, or otherwise, as the court may direct; and for such other and further relief as may be just and equitable.

CHAPTER LXXI.

COMPLAINTS IN ACTIONS TO QUIET TITLE OR DETERMINE ADVERSE TITLES TO REAL ESTATE.

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| 1171. Complaint by owner in statutory action to quiet title. | 1178. Complaint in equity to enjoin a judicial sale and remove cloud. |
| 1172. The same, by mortgagee. | |
| 1173. Complaint in statutory action by one in possession to quiet title (Minnesota). | 1179. Complaint in equity to cancel a mortgage which is a cloud upon title, general form. |
| 1174. Complaint in statutory action by owner to quiet title to vacant or unoccupied land (Minnesota). | 1180. By owner to cancel mortgage which has been paid. |
| 1175. Complaint by owner in statutory action to quiet title (Iowa). | 1181. By owner to cancel mortgage obtained by duress. |
| 1176. By owner in statutory action to quiet title (North Dakota and South Dakota). | 1182. By owner to cancel deed and quiet title. |
| 1177. The same, when possession of the premises is also sought (North Dakota and South Dakota). | 1183. Complaint in equity by owner to set aside illegal tax or assessment. |
| | 1184. Complaint by owner in statutory action to set aside tax claims (Minnesota). |
| | 1185. Complaint in statutory action by tax title claimant to bar original owners. |

Courts of equity have exercised the power to prevent or remove clouds on the title of land, from very early times. In such an action it must appear by the complaint that it is brought by the owner, and that the cloud to be removed is an apparent incumbrance which renders a resort to evidence outside of the record necessary to show that it is invalid. When these facts are shown, the court will grant full relief by the reformation, surrender, or cancellation of deeds or other instruments, or the execution of deeds or releases as may be necessary. *Pier v. Fond du Lac*, 38 Wis. 470. In addition to this ancient remedy the statutes of several of the states provide similar remedies. In Wisconsin any person having title and possession of land, or having title to vacant land, or owing any incumbrance on land, may bring an action against any person making any claim thereto, for the purpose of establishing the plaintiff's right. Wis. Stats. 1898 sec. 3186. In Minnesota any person in posses-

sion of land, or claiming title to unoccupied land, may bring the action against any person claiming any estate or interest therein, or lien upon the same, adverse to the plaintiff. Minn. Rev. Laws 1905 sec. 4424. In Iowa any person claiming title, whether in possession or not, may bring his action against any person making an adverse claim to the property. Iowa Code sec. 4224. In North Dakota any person having an estate or interest in real property may bring action against another claiming an estate or interest therein adverse to the plaintiff, for the purpose of determining such adverse claim. N. Dak. Rev. Codes sec. 5904. And all who claim interests under a common source of title may join as plaintiffs in the action. N. Dak. Rev. Codes sec. 5908. In South Dakota the provisions of statute are substantially the same as in North Dakota. S. Dak. Rev. Codes C. P. secs. 675-679. In Nebraska any person or persons claiming title to real estate, whether in possession or not, may bring the action against any person or persons claiming an adverse estate or interest therein. Cobbeys' Ann. Stats. of Nebr. sec. 10270. In these statutory actions it is not necessary that the interest or estate claimed by the defendant should be apparently valid, but simply that there should be adverse claim by the defendant.

1171. Complaint by owner in statutory action to quiet title (Wis. Stats. 1898 sec. 3186).

I. That the plaintiff is the owner in fee simple of the following described premises, to-wit [*describe same*] situate in said county, and state of Wisconsin; and that he is in the actual possession and occupancy thereof [*or, that the said premises are vacant and unoccupied*].

II. That the defendant makes some claim to said premises, adverse to the plaintiff's said title, whereas in truth and in fact the defendant has no interest or estate in said premises of any nature.

WHEREFORE the plaintiff demands judgment that his claim to said premises be established against any claim of the defendant therein, and that the defendant be forever barred against having or claiming any right or title to the said premises adverse to the plaintiff; and that he release to the plaintiff all claim to said premises, and pay the costs of this action, and that the plaintiff have such further relief as may be just and equitable.

1172. The same, by mortgagee (Wis. Stats. 1898 sec. 3186).

I. That the plaintiff is the owner and holder of an incumbrance or lien upon the following described premises [*describe*

same] which said incumbrance or lien consists of a mortgage thereon duly executed by G.... H.... the owner in fee of said premises, on the day of, 19.., to secure the payment of dollars, and which mortgage is still subsisting and unpaid.

II. [*As in last preceding form, substituting the word incumbrance or mortgage, for the word title.*]

WHEREFORE, etc. [*prayer for judgment as in the last preceding form.*]

1173. Complaint in statutory action by one in possession to quiet title (Minn. Rev. Laws 1905 sec. 4424. Held sufficient in Barber v. Evans, 27 Minn. 92 s.c. 6 N. W. 445).

I. That the plaintiff is in the actual possession of [*describing premises*] in the county and state aforesaid.

II. That defendant claims an estate or interest in said premises or lien thereon adverse to the plaintiff.

WHEREFORE plaintiff demands judgment that the said defendant has no estate or interest in said premises or lien thereon, and for the costs and disbursements of this action.

1174. Complaint in statutory action by owner to quiet title to vacant or unoccupied land (Minn. Rev. Laws 1905 sec. 4424).

I. That the plaintiff is the owner in fee of the following described lands [*describe same*] and that the same are vacant and unoccupied.

II. That the defendant claims an interest or estate in said premises, or lien thereon adverse to the plaintiff.

WHEREFORE plaintiff demands judgment that he be declared to be the owner in fee of said premises, and that the defendant has no interest therein or lien thereon, and for the costs and disbursements of this action.

1175. Complaint by owner in statutory action to quiet title (Iowa Code sec. 4224).

I. That the plaintiff is the owner in fee simple of the following described real estate [*insert description*].

II. That the plaintiff is credibly informed, and believes, that the defendant makes some claim adverse to the estate of the plaintiff in said property.

WHEREFORE the plaintiff prays judgment that his estate be established against the adverse claims of the defendant, and that said defendant be barred and forever estopped from having

or claiming any right or title adverse to plaintiff in and to said premises, that defendant be adjudged to pay costs of this action.

[*The statute requires that the petition be verified.*]

1176. By owner in statutory action to quiet title (N. Dak. Rev. Codes sec. 5904; S. D. Rev. Codes C. P. sec. 675).¹

I. That the plaintiff is the owner in fee simple of the following described real estate [*insert accurate description*].

II. That the defendant wrongfully claims an estate or interest in the said real estate adverse to the said plaintiff.

WHEREFORE plaintiff demands judgment that the plaintiff's title to said lands be adjudged valid, and that the defendant has no lawful estate or interest in said lands, or any of them, and that the plaintiff recover the costs of this action.

[*Chap. 111 S. Dak. sess. laws 1905 gives an action to quiet title against unknown persons, heirs and legal representatives which does not supersede the action authorized by sec. 675 C. P. S. D. but is cumulative. Buckham v. Hoover (S. D.) 101 N. W. 28. The necessary allegations of a complaint under the new act are fully set forth in section 3 thereof and a special summons is provided in section 5.*]

1177. The same, when possession of the premises is also sought (N. Dak. Rev. Codes sec. 5907; S. Dak. Rev. Codes C. P. sec. 678).

I. [*As in last preceding form.*]

II. That the defendants C.... D.... and E.... F.... wrongfully claim some interest or estate in said real estate adverse to the plaintiff, and that the defendant E.... F.... is in actual possession of said real estate, and wrongfully withholds the same from the plaintiff.

[*Add to demand for judgment in last preceding form*]: that the plaintiff have a writ for the possession of said premises, etc.

1178. Complaint in equity to enjoin a judicial sale and remove cloud.

I. That at the dates hereinafter mentioned the plaintiff was and still is the owner of the following described premises, viz. [*describe them*].

II. That plaintiff purchased said premises on the day of, 19.., from one E.... F.... for the sum of dollars, which sum was then duly paid, but that the legal title to said premises has remained in E.... F....

¹ This complaint sufficient. *Clark v. Darlington*, 7 S. Dak. 148 s.c. 63 N. W. 771; *Ely v. Ry. Co.*, 129 U. S. 291 s.c. 9 Sup. Ct. 293. A tax cer-

tificate holder is a proper defendant. *Clark v. Darlington*, *supra*; see also *McHenry v. Kidder Co.*, 8 N. Dak. 413 s.c. 79 N. W. 875.

III. That on the day of, 19.., one G.... H.... recovered a judgment for the sum of dollars in the court for county, against said E.... F...., and on or about the day of, 19.., execution was issued on said judgment at the instance of the plaintiff therein, and placed in the hands of O.... P.... sheriff of county, who on the day of, 19.., levied the same upon said real estate as the property of said E.... F...., and has advertised said real estate for sale on the day of, 19.., under said execution.

IV. That said judgment is not now and at no time has been a lien upon said real estate, or any part thereof, for the reason that said E.... F.... since the recovery of said judgment, has had no interest in said real estate, and that the sale of said real estate under said execution will cast a cloud upon the plaintiff's title to the same.

WHEREFORE the plaintiff demands judgment that the defendant may be forever enjoined from selling said real estate under said execution, and from enforcing said judgment against said real estate, and that the title to said real estate may be adjudged to be in this plaintiff, free and clear from all claim or lien thereon by virtue of said judgment and execution, and that the plaintiff recover the costs of this action, and have such other and further relief as may be just and equitable.

1179. Complaint in equity to cancel a mortgage which is a cloud upon title, general form.

I. That the plaintiff is the owner in fee simple of the following described premises [*insert description*].

II. [*Allege the making of the mortgage, or other apparent lien, stating facts which show that on its face it appears valid, and that in fact it is void.*]

III. That said mortgage was, on the day of, 19.., duly recorded in the office of the register of deeds of said county, in book of mortgages, p., and still remains unsatisfied of record, and a cloud upon the plaintiff's title.

WHEREFORE the plaintiff demands judgment that the defendant give up said mortgage to be cancelled, and that the same be satisfied of record; and for the costs of this action.

1180. By owner to cancel mortgage which has been paid.

I. [*Allege ownership of premises as in last preceding form.*]

II. That on the day of, 19.., the plaintiff made and delivered to the defendant a mortgage upon said premises to secure the payment of a certain promissory note of that date,

executed by plaintiff for the sum of dollars due, 19.., which mortgage on said day was duly recorded in the office of the register of deeds of county and still remains of record undischarged.

III. That on the day of, 19.., the plaintiff paid said notes in full, and thereupon tendered to said defendant his reasonable charges for discharging said mortgage upon the records of the county, and requested him to acknowledge satisfaction thereof upon said records, and that more than seven days have elapsed since said tender and request to discharge said mortgage, but said defendant has entirely failed to discharge the same and still refuses so to do.

IV. That said mortgage is a cloud upon plaintiff's title to said real estate [and the plaintiff has sustained damages by reason of the failure of said defendant to discharge the same in the sum of dollars].

WHEREFORE the plaintiff demands judgment that said mortgage may be declared satisfied and discharged of record, and the said cloud upon plaintiff's title be removed [and that he recover dollars, his damages aforesaid] with the costs of this action.

**1181. By owner to cancel mortgage obtained by duress
(adapted from *Galusha v. Sherman*, 105 Wis. 263).**

I. [*Allege ownership of property mortgaged, as in preceding form.*]

II. That on or about the day of, 19.., the defendant A.... B...., with the intent to defraud and cheat the plaintiff, and to obtain from plaintiff the note and mortgage hereinafter described, commenced an action against the plaintiff in the court to recover the sum of dollars, and alleged in the complaint in said action that this plaintiff had knowingly and maliciously given and sold to the said A.... B.... impure, diseased, corrupted and unwholesome food to eat, which allegation was wholly false and known so to be by said defendant A.... B....

III. That the said defendant A.... B.... on or about the said day of, 19.., caused the said complaint and summons in legal form to be served on this plaintiff by one E.... F.... and that the said E.... F.... at the time of the service and at the direction of the defendant A.... B.... told the plaintiff that he [plaintiff] had committed a crime against the laws of this state, and was liable to imprisonment therefor, and that unless the plaintiff settled the said action he [the

plaintiff] would be arrested on a criminal warrant and imprisoned in the state prison, but that if he settled the same no criminal proceeding would be commenced.

IV. That the plaintiff, fearing that the defendant would execute said threats and cause this plaintiff to be arrested and imprisoned, proceeded with the said E.... F.... to the city of and to the office of the defendant A.... B.... and that the said A.... B.... [and one G.... H....] then and there told this plaintiff that he would have to pay said A.... B.... the sum of dollars, and that unless he did so or gave a mortgage therefor upon his said real estate, he [the plaintiff] would be arrested on criminal warrant and imprisoned in the state prison; all of which threats and statements were false and fraudulent in fact and were made with intent to intimidate and defraud this plaintiff.

V. That this plaintiff was overcome with great fear by reason of said threats, and his judgment and power of will were thereby coerced and subdued; and believing that if he did not pay said sum of money or give said mortgage as demanded he would be arrested and imprisoned as aforesaid, this plaintiff in order to avoid such prosecution and imprisonment and for no other purpose or consideration executed and delivered to the defendant A.... B.... his promissory note [*describe the note*] and to secure payment thereof at the same time executed and delivered to the defendant A.... B.... a certain mortgage upon the said real estate [*describe mortgage*] which said mortgage was immediately recorded by the said defendant in the office [*name proper office*] and is still of record undischarged.

VI. That the said note and mortgage were so executed and delivered without any consideration whatever, and under the compulsion and duress of the aforesaid threats of prosecution and imprisonment, and are wholly void, but that the said mortgage constitutes an apparent cloud upon the title of the plaintiff to said real estate.

VII. That the defendant A.... B.... is still the holder of said note and mortgage [*or if assigned, allege assignment and assignee's knowledge of facts and make such assignee a defendant*].

WHEREFORE plaintiff demands judgment that said note and mortgage be declared void, and that the same be delivered up and cancelled and discharged of record, and the cloud upon plaintiff's title to said real estate removed, and that said defendant be enjoined and restrained from selling or transferring said note and mortgage, and for such further relief as may be just and equitable, with costs.

1182. By owner to cancel deed and quiet title.

I. That on the day of, 19.., one E.... F.... was the owner in fee of the following described premises [*describe same*] and that said E.... F.... on said day sold and conveyed the same by deed duly executed to G.... H.... who thereafter and on the day of, 19.., sold and conveyed the same by deed duly executed to this plaintiff.

II. That immediately after the conveyance of said premises to this plaintiff he went into actual possession of the same, and has used, occupied and possessed the same ever since that time and is still in possession thereof, and has made valuable improvements thereon, of the value of dollars.

III. That all of the said conveyances of said premises except the deed from E.... F.... to G.... H.... were duly recorded in the office of the register of deeds of county, soon after the same were executed and delivered, but by accident said deed from E.... F.... to G.... H.... was not recorded until about the day of, 19.., and while the plaintiff was in possession of said premises.

IV. That on or about the day of, 19.., the defendant J.... K.... obtained, with full knowledge and notice of the plaintiff's ownership of said premises, a quitclaim deed for said premises from said E.... F.... for an alleged consideration of dollars, and has had the same recorded in the office of the register of deeds of said county, and now claims title to said premises against the plaintiff under said deed, and that said deed is a cloud upon the plaintiff's title to said premises, and tends to depreciate the value thereof.

WHEREFORE the plaintiff demands judgment that said deed from E.... F.... to J.... K.... may be set aside and declared null and void, and that the cloud upon plaintiff's title caused thereby may be removed; and for such other relief as equity may require, and for the costs of this action.

1183. Complaint in equity by owner to set aside illegal tax or assessment.

I. [*Allege ownership of premises in plaintiff, as in preceding forms.*]

II. [*Allege corporate character of city or other municipal corporation which has attempted to levy the tax.*]

III. [*Allege levy of tax or assessment upon the plaintiff's lands, and issuance of tax certificates or deeds, if any; the holder should be made a defendant.*]

IV. [*Allege with certainty and particularity the defects or illegalities in the levy which are relied on to avoid the tax.*]

V. [*Allege tender of amount equitably due if one has been made, or otherwise allege willingness to pay same unless the land be exempt or the tax has been in fact paid, or the tax was without jurisdiction.*]

WHEREFORE [*demand of judgment for cancellation of tax and certificates or deeds, with prayer for injunction if necessary.*]

1184. Complaint by owner in statutory action to set aside tax claims.²

I. That the plaintiff is the owner in fee [and in possession] of the following premises [*describe same*].

II. [*If the premises are vacant*]: That said premises are vacant and unoccupied.

III. That defendant claims a title or interest in said premises, or lien thereon adverse to the plaintiff, by and through certain tax certificates or tax deeds, which in truth and in fact are invalid.

WHEREFORE plaintiff demands judgment that said tax certificates or tax deeds be adjudged void, and that the cloud thereby created upon plaintiff's said title be removed, and that plaintiff recover the costs and disbursements of this action.

1185. Complaint in statutory action by tax title claimant to bar original owners (Wis. Stats. 1898 secs. 1197-1199).

I. That the plaintiff claims title to the following described lands and premises, to-wit [*describe same*] under and by virtue of a certain tax deed made, executed and delivered to the plaintiff, pursuant to law, on the day of, 19.., by the

²A complaint in substantially this form was held sufficient in *Lewis v. Bartleson*, 39 Minn. 89 s.c. 38 N. W. 707, under Minn. Gen. Laws 1897 c. 266. The last named act was a re-enactment, with amendments, of Minn. Gen. Stats. 1894 sec. 5821, which section seems to have been omitted in the Minn. Rev. Laws 1905. This complaint, however, seems to allege all that is necessary in an ordinary action to determine adverse claims under Minn. Rev. Laws 1905 sec. 4424. In view of the uncertainty created by the failure to re-enact the provisions

of Minn. Gen. Laws 1897 c. 266, and also in view of the provisions of Minn. Rev. Laws 1905 sec. 974, it would be advisable for the pleader to describe in his complaint the tax certificate or deed which he seeks to set aside, and to state specifically the reasons for its invalidity. He must also pay into court at the time of the commencement of the action the amounts for which the land was sold and all subsequent taxes, with interest at twelve per cent, and should state such facts in his complaint.

county clerk of said county of [*or other officer, as the fact may be*], of which deed a true copy is hereto annexed, marked Exhibit A, and made a part of this complaint.

II. That the defendants C.... D.... and E.... F.... were the former owners of said tracts described in said deed, and the defendants G.... H.... and J.... K.... claim under said former owners, to-wit, the said G.... H.... claims [*describe parcel*] under the defendant C.... D.... and the defendant J.... K.... claims [*describe parcel*] under the defendant E.... F....

III. That the plaintiff has paid in taxes on said premises as follows [*here specify amount of taxes paid by plaintiff, including redemptions, stating dates of payment*].

WHEREFORE the plaintiff demands judgment against said defendants that they be barred of all right, title, interest or claim in said lands, or any part thereof, and for the costs and disbursements of this action.

CHAPTER LXXII.

COMPLAINTS IN CREDITORS' ACTIONS TO REACH NON-LEVIABLE ASSETS OR PROPERTY FRAUDULENTLY CONVEYED.

1186. Complaint by judgment creditor to set aside fraudulent conveyance of real estate, general form.
1187. The same, where plaintiff sues on behalf of himself and other judgment creditors.
1188. The same, upon a justice's judgment.
1189. Against debtor to reach demands due from third persons.
1190. Against the judgment debtor, his assignee, and a pretended creditor named in the assignment, to set aside a general assignment for fraud extrinsic to the instrument.
1191. To set aside an assignment which is void on its face.
1192. Against debtors who transferred their assets to a third person for his note, and assigned the note for benefit of creditors, seeking to set aside the transaction as fraudulent, and for a receiver.
1193. Against debtor and his trustee, to reach the trust fund or its income.
1194. By an assignee of a judgment, against the judgment debtor and his mortgagee of personal property, and an assignee to whom, by a fraudulent agreement between them, the debtor's property, including the mortgaged property, had been transferred.
1195. Against judgment-debtor and one to whom he fraudulently confessed judgment, to set aside judgment and sale thereunder.
1196. Complaint by two creditors suing together against debtor and his fraudulent grantee, to set aside conveyance of real estate.
1197. By attaching creditor in aid of writ of attachment against fraudulent grantee, to set aside deed of real estate.
1198. By judgment creditor against debtor and fraudulent grantee, to set aside fraudulent transfer of personal property.
1199. By judgment creditor against the debtor, his wife, two other fraudulent grantees of personal property, and a banking corporation, to reach concealed personal property and moneys.
1200. By judgment creditor to set aside conveyance made prior to the creation of the indebtedness due to the plaintiff.
1201. By creditor to reach salary due the debtor.
1202. By judgment creditor, to reach royalties falling due from publishers to the debtor under a contract.
1203. By assignee in bankruptcy

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| <p>to recover unlawful preference, or its value.</p> <p>1204. By administrator, to reach property fraudulently conveyed by his intestate.</p> <p>1205. By creditor against grantee of deceased debtor, when estate is insufficient to pay claims proven.</p> <p>1206. By creditor of deceased debtor, to reach land pur-</p> | <p>chased by the debtor, but conveyed to a third person in fraud of creditors.</p> <p>1207. Complaint by a judgment creditor against insolvent corporation and its officers, to reach unpaid stock subscriptions and corporate assets fraudulently conveyed by the officers to themselves.</p> |
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Where tangible personal property which is subject to levy and sale on execution has been transferred by a debtor in fraud of creditors, it may be seized by attachment or levied upon and sold under an execution, and in such case it will be unnecessary for the creditor to bring any action to set aside the alleged fraudulent sale or transfer. The sale upon execution will carry the title and possession, and if the fraudulent grantee desires to test the validity of his title he will be compelled to bring an action of trespass, replevin or trover, in which action the purchaser may by answer set up the fraudulent character of the plaintiff's title. See Form 1601.

In Wisconsin and North Dakota, by statute, such property as well as non-leviable assets in the possession of the fraudulent grantee may be reached by garnishment. Wis. Stats. 1898 sec. 2768; N. Dak. Rev. Codes sec. 5398. Such is the rule in most jurisdictions in the absence of statute. Am. & Eng. Ency. of Law, vol. 14, pp. 790, 791, and notes; *Bank v. Council Bluffs F. Co.*, 89 Iowa, 618 s.c. 57 N. W. 444; *N. S. B. & S. Co. v. Ladd*, 32 Minn. 38 s.c. 20 N. W. 334.

In case of the fraudulent transfer of real estate a creditor, after having obtained judgment and issued execution, may generally maintain an action in equity to remove the fraudulent obstruction to the satisfaction of his judgment by a decree declaring the transfer void. This is a creditor's action in aid of execution simply, and is for the benefit of the creditor who brings the action, and none others. After the return of an execution unsatisfied he may bring an action to set aside fraudulent conveyances or incumbrances on real estate, or to reach non-leviable assets which the debtor refuses to apply to the payment of his debt, and the relief sought should include provisions for the satisfaction of the debt out of the property fraudulently conveyed or concealed. Personal property which is leviable in its character, but which has been fraudulently conveyed, may in some jurisdictions be reached in the same manner if it appears that the creditor will be seriously embarrassed and the

property sacrificed by attempting to enforce the remedy at law. *Gullickson v. Madsen*, 87 Wis. 19. See generally on this subject Wis. Stats. 1898 secs. 3029-3186; *Gates v. Boomer*, 17 Wis. 455; *Cornell v. Radway*, 22 Wis. 260; *Evans v. Laughton*, 69 Wis. 138; *Ahlhouser v. Doud*, 74 Wis. 400; *Gilbert v. Stockman*, 81 Wis. 602; *Pierstorff v. Jorge*s, 86 Wis. 128. This action is for the benefit of all creditors similarly circumstanced, except that specific liens which have been obtained by judgment or otherwise will be preserved.

In Minnesota, in order to reach land fraudulently conveyed it is necessary that the creditor first obtain judgment, and docket it in the county where the land lies; the issuance of execution is unnecessary. Minn. Rev. Laws 1905 sec. 3498; *Massey v. Gorton*, 12 Minn. 145; *Scanlan v. Murphy*, 51 Minn. 536. But in an action to reach equitable assets an execution must first have been issued and returned unsatisfied. *Wadsworth v. Schisselbauer*, 32 Minn. 84.

In Iowa, under Iowa Code sec. 4087, the action, or equitable proceeding as it is there called, may be brought at any time after judgment. No mention is made of the issuance or return of execution, but it is doubtless safer that such steps be taken and alleged in the petition.

Such an action can in no case be brought by a mere creditor at large who has not recovered judgment, unless by virtue of some special statutory provision. There are various provisions authorizing the maintenance of such actions by receivers, assignees, administrators, and other officers, on behalf of creditors; when so brought, the complaint must of course allege the representative character of the plaintiff, and the taking of such steps as may be made necessary by the particular statute to authorize the maintenance of the action.

The action may be brought against corporations and their fraudulent grantees, but it is held in Wisconsin in case of domestic corporations that if a judgment creditor subsequently brings action to sequester the property of the corporation under Wis. Stats. 1898 secs. 3216-3228, the previous action will be enjoined under sec. 3227. *Pierce v. Mil. Construction Co.*, 38 Wis. 253.

1186. Complaint by judgment creditor to set aside fraudulent conveyance of real estate, general form.

I. That on the day of, 19.., in an action then pending in the court of the county of state of a judgment was duly rendered and given by said court in favor of this plaintiff and against the defendant C....

D.... for the sum of dollars, which judgment was founded upon a claim which accrued prior to the conveyance hereinafter set forth.

II. That on said day [*or on the day of, 19..*] said judgment was duly docketed in the office of the clerk of court for the county of wherein said defendant C.... D.... then resided.

III. That on the day of, 19.., an execution was duly issued out of said court against the personal and real property of said defendant C.... D...., and delivered to the sheriff of the county of wherein said defendant then resided; and, that said execution was, on the day of, 19.., returned by said sheriff wholly unsatisfied [*or, satisfied as to the sum of dollars and unsatisfied as to the remainder of said judgment*].

IV. That said judgment is still owned by plaintiff, and that there is now actually and equitably due thereon the sum of dollars.

V. That on the day of, 19.., the defendant C.... D.... conveyed to the defendant E.... F.... the following described real property [*describe property*].

VI. That the defendant C.... D.... made said conveyance [without consideration and] with intent to hinder, delay and defraud plaintiff in the collection of his claim, and the same was received by the defendant E.... F.... with full knowledge of such intent.

WHEREFORE plaintiff demands judgment that the said conveyance from the said C.... D.... to the said E.... F.... be adjudged null and void; that the said lands may be sold as provided by law, and the proceeds of such sale be applied to the payment of the plaintiff's said judgment; and for such other relief as may be equitable.

[*In Wisconsin insert before demand for judgment:* VII. That this action is not commenced or prosecuted by collusion with the said C.... D.... or for the purpose of protecting the property or effects of the said C.... D.... against the claims of other creditors, but for the sole purpose of compelling payment and satisfaction of the plaintiff's own debt. *Wis. C. C. Rule XXVII sec. 2.*]

1187. The same, where plaintiff sues on behalf of himself and other judgment creditors.

The plaintiff, complaining on behalf of himself and all other judgment creditors of the defendant [whose executions have been returned unsatisfied, and] who shall in due time come in

and seek relief by, and contribute to the expenses of this action, alleges:

I. [*Proceed substantially as in last preceding form.*]

1188. The same, upon a justice's judgment.

I. That on the day of, 19.., at before M.... N.... a justice of the peace in and for the town of, the plaintiff recovered a judgment, which was duly given by said justice, against the defendant C.... D.... for dollars damages and dollars costs, in an action wherein this plaintiff was plaintiff [*or, defendant*], and the defendant herein was defendant [*or, plaintiff*].

II. That on the day of, 19.., a transcript of the same was filed and docketed in the office of the clerk of the county of [*if the judgement debtor resided in another county, add: and on the day of, 19.., a transcript of the same was filed and docketed in the office of the clerk of the county of]* in which county the defendant then resided [*or state ignorance of residence, etc., as in Form 1189*].

III. That on the day of, 19.., an execution in due form was issued upon the said judgment against the personal and real property of the defendant, to the sheriff of said [*last-mentioned*] county, in which county the defendant then resided.

[*Continue as in Form 1186.*]

1189. Against debtor to reach demands due from third persons.

I. That on the day of, 19.., at in the court in and for the county of state of the plaintiff recovered a judgment which was duly given by said court against the defendant [*if there were other judgment defendants add: and M.... N.... and O.... P....*] for dollars in an action wherein this plaintiff was plaintiff [*or defendant*] and the defendant herein was [*or the defendant herein and said M.... N.... and O.... P.... were*] defendant [*or plaintiff*]; and that on the same day [*or, the day of, 19..*] said judgment was docketed in the office of the clerk of said county [*and on the day of, 19.., a transcript thereof was filed, and the judgment docketed in the county of*].

II. That on the day of, 19.., an execution in due form was issued upon the said judgment against the personal and real property of [*all said debtors*] to the sheriff of said [*last-mentioned*] county, in which county the defendant then resided [*or, in which county was the defendant's last known*].

residence within this state, his residence at the time of said execution being unknown to the plaintiff, and not ascertainable, though the plaintiff made diligent inquiry therefor]; [or say: in which county was the defendant's residence at the time of bringing said action, his residence at the time of said execution being unknown to the plaintiff, and not ascertainable, though the plaintiff made diligent inquiry therefor].

III. That said execution has been returned by said sheriff wholly unsatisfied [or, unsatisfied except as to the sum of dollars] and there is now actually and equitably due to the plaintiff on said judgment dollars, with interest from the day of, 19..

IV. That a short time before the commencement of the action in which said judgment was obtained, and after the indebtedness on which said judgment is based had accrued, said defendant was and for several years previous thereto had been engaged in the mercantile business at and [as plaintiff is informed and believes] various persons became indebted to him in large amounts; that although the said defendant, about the time or soon after the commencement of this action, to-wit, about the day of, 19.., did assign and transfer all his stock in trade to one M.... N...., yet the said business is still wholly unsettled; and that the defendant had at the time of the commencement of this action debts due him to a large amount, to-wit, to an amount not less than dollars, a considerable portion of which are evidenced by charges on his books of account, which the said defendant refuses to produce, or allow to be examined by or on behalf of the plaintiff; and the plaintiff is therefore unable to specify, and cannot learn, and does not know, the particular items or amounts of said indebtedness, or the names of the several persons from whom the same are due; but is informed and believes that several of them, owing the defendant in the aggregate a sum not less than dollars, reside at and are solvent and able to pay the respective demands against them.

V. [Where a debtor in the judgment is not made a defendant in this action because of insolvency or absence, add]: That said [insolvent or absentee] is wholly insolvent and destitute of property [or, is not and has not been for the space of within this state, but resides at in the state of and has no property within this state.

VI. [Where a debtor in the judgment is not made a defendant because he was merely a surety, add]: That the said judgment was recovered in an action [describing it, e. g., thus:] brought to foreclose a mortgage made by the defendant to said

[*surety*] with a bond collateral thereto, and that said bond and mortgage was assigned to the plaintiff by the said [*surety*] who thereupon guaranteed the payment thereof; but the same not being paid, and the mortgaged premises being sold upon foreclosure in said action for less than the sum due, said judgment was recovered for the deficiency, as to which the said [*surety*] was merely a surety, and not liable as a principal debtor, and which it was, by a provision in said judgment, directed should be levied of the property of the defendant [*principal debtor*] if it could be so collected; and if it could not, then to be levied of the property of said [*surety*].

[*In Wisconsin add allegation negating collusion with the debtor, as in Form 1186.*]

WHEREFORE the plaintiff demands: (1) That the said defendant be adjudged to apply to the payment of the amount of said judgment and interest thereon, together with the costs of this action, said property, debts, choses in action, and equitable interests belonging to him, or held in trust for him, or in which he is in any way or manner beneficially interested. (2) That he be enjoined from selling, transferring, or interfering with said property, debts, things in action, and equitable interests. (3) That he be prohibited from making an assignment, or confessing any judgment, to enable other creditors or persons to obtain a preference over plaintiff, or to take any portion of defendant's property. (4) That a receiver may be appointed of all said property, equitable interests, things in action, and effects of the said defendant, and said defendant directed to execute to him an assignment thereof, and said receiver sell, or otherwise dispose of the same, and convert the same into money, as soon as may be, and that said receiver apply so much of the proceeds thereof as may be necessary for that purpose, to the payment of the plaintiff's said debt, with interest and costs of this action.

1190. Against the judgment-debtor, his assignee, and a pretended creditor named in the assignment, to set aside a general assignment for fraud extrinsic to the instrument.

I, II and III. [*Allege judgment and issue and return of execution, and amount due, as in Form 1186 or 1189.*]

IV. That after the contracting of the debt on which aforesaid judgment was recovered, said [*judgment-debtor*] assigned all his property to the defendant [*assignee*] in trust for the payment of his debts [*or made an assignment of which a copy is annexed as a part of this complaint.*].

V. That the said [*assignee*] accepted the said trust, and has collected a large sum of money and other property from the assets of his assignors, amounting in all to the value of over dollars.

VI. That the property so assigned is of the value of dollars.

VII. That the said assignment was made by the said [*judgment-debtor*] with the intent to delay, hinder, and defraud his creditors; that it was not accompanied by an immediate and continued change of possession of the said property; that ever since the same was executed and delivered, and up to the present time, the said property has remained in the actual possession and under the control of said [*judgment-debtor*] who has retained possession and control thereof under the false and fraudulent pretence that he is agent of said [*assignee*].

VIII. That the pretended indebtedness set forth in said assignment as due from the defendant [*judgment-debtor*] to the defendant [*the preferred creditor*] is fictitious; that, in fact, no such indebtedness exists, but the same is therein inserted for the purpose of enabling the defendant [*judgment-debtor*] to distribute the proceeds of the goods passed under the assignment among his friends, and thereby to keep the possession and control thereof himself.

IX. That the defendant [*judgment-debtor*] has not any property other than that embraced in the assignment aforesaid, out of which the execution aforesaid could be satisfied in whole or in part; and that unless the said property can be reached and applied to the payment of said judgment, the same must remain wholly unpaid.

[*In Wisconsin add allegation negating collusion, as in Form 1186.*]

WHEREFORE the plaintiff demands judgment: (1) That said assignment be adjudged fraudulent and void as against the plaintiff [and such other judgment-creditors of said *judgment-debtor* as shall elect to come in and share the expenses of this action]. (2) That a receiver of all the property and effects of said [*judgment-debtor*] be appointed. (3) That the defendants be adjudged to account for all the property received by them or either of them under said assignment, and for all proceeds arising from sale thereof, and deliver the same to such receiver. (4) That the defendants be, in the mean time, enjoined from disposing of any of said property, or paying away any of the proceeds thereof, or in any wise interfering therewith. (5) That said receiver pay, out of the proceeds of said property, the judgment aforesaid, and the costs and expenses of

this action, and hold the balance subject to the further order of this court.

1191. To set aside an assignment which is void on its face.

I, II and III. [*Allege judgment and issue and return of execution, and amount due, as in Form 1186 or 1189.*]

IV. [*Allege making of assignment, setting it forth or annexing it, as in Form 1190, adding*]: And the plaintiff alleges and submits that the said instrument of assignment is fraudulent and void upon its face, for the reason that [*here set forth specifically the grounds of invalidity*], and he alleges that it was made and executed by the said defendant [*assignor*] [and accepted by the defendants, *assignees*] with the intent to hinder, delay and defraud the creditors of said [*assignor*].

[*Continue as in other forms.*]

1192. Against debtors who transferred their assets to a third person for his note, and assigned the note for benefit of creditors, seeking to set aside the transaction as fraudulent, and for a receiver.

I, II and III. [*Allege judgment and issue and return of execution, and amount due, as in Form 1186 or 1189.*]

IV. That on the day of, 19.., said [*judgment-debtors*] were booksellers at doing business as partners under the firm-name of Y.... Z.... & Co.; and were possessed of [*designating the assets, e. g., thus:*] a large stock of books, stationery, fancy articles, jewelry, and musical publications, a valuable lease of their store, No. street, having five years to run, and sundry demands against other persons; but were insolvent and unable to pay their creditors punctually or in full.

V. That on that day, and after the indebtedness for which the plaintiff's judgment was recovered had accrued, the said defendants [*judgment-debtors*] in contemplation of, and with full knowledge of their insolvency, made a pretended sale of their said stock to the defendant [*transferee*] then a clerk in their employ in their said store, and took in payment therefor his promissory notes having several months to run, but for what exact amounts these plaintiffs do not know and cannot state.

VI. That the defendant [*clerk*] was wholly irresponsible and insolvent, and has no means of paying his said notes, except such moneys as he may derive from the sale of the property transferred to him as aforesaid.

VII. That thereafter and on the same day the said [*judgment-debtors*] executed and delivered to the defendants [*as-*

signees] an instrument in writing, of which the following is a copy [*copy assignment, or say, of which a copy is annexed as a part of this complaint, and annex a copy at the end of the complaint.*]

VIII. That the property so assigned is of the value of about dollars and upwards.

IX. That the said note to the said [*clerk*] and the said assignment to [*assignee*] were intended by each and all of the aforesaid defendants to be one transaction, and were in fact one transaction, and were intended and completed for the purpose of delaying, hindering, and defrauding the creditors of said [*judgment-debtors*] by putting it out of the power of such creditors to reach by execution, or other due process of law, the stock and assets of the said [*judgment-debtors*]; that such sale and assignment were not, nor was either of them, followed by immediate and continued change of possession; that ever since the said sale was made, and since said assignment was delivered, and up to the present time, the said property has remained in the actual possession and under the control of the said [*judgment-debtors*] who have obtained possession and control thereof under the false and fraudulent pretence that they are agents of said [*clerk*].

[X. That said assignment is fraudulent and void upon its face, for the reason that, *specifying reason*].

XI. That the defendants [*judgment-debtors*] have not, nor has either of them, any property other than that embraced in the sale and assignment aforesaid, out of which the execution aforesaid could be satisfied in whole or in part, and that unless the said property can be reached and applied to the payment of said judgment, the same must remain wholly unpaid.

WHEREFORE these plaintiffs demand judgment: (1) That the said sale by the defendants [*judgment-debtors*] to the said [*clerk*] and said assignment by the defendants [*judgment-debtors*] to the defendant [*assignee*] may each be declared fraudulent and void as against these plaintiffs. (2) That a receiver of all the property and effects of the said [*judgment-debtors*] or either of them, which they or either of them had at the time of the said sale to the defendant [*clerk*] or at any time thereafter, be appointed. (3) That the defendants, and each of them, be adjudged to account for all the property received by them, or either of them, under either the sale or assignment aforesaid, and for all proceeds arising from the sale thereof, and deliver the same to such receiver. (4) That the defendants, and each of them, be in the meantime enjoined from disposing of any of said property, or paying away any of the proceeds

thereof, or in any wise interfering therewith. (5) That the said receiver be directed to sell the said property, or so much thereof as may be necessary, and to pay out of the proceeds of said property the judgment aforesaid, and the costs and expenses of this action, and hold the balance subject to the order of this court.

[In Wisconsin insert allegation negating collusion before prayer for judgment, as in Form 1186.]

1193. Against debtor and his trustee, to reach the trust fund or its income.¹

I, II and III. [*Allege judgment and execution and return unsatisfied, and amount due, as in Form 1186.*]

IV. That the defendant [*judgment-debtor*] is the beneficiary under a trust created by deed heretofore executed by him [*or, created by the will of one M.... N.... deceased*] of which a copy is hereto annexed as a part of this complaint.

V. That the fund, consisting of about the sum of dollars, is now in the hands of the defendant [*trustee*] as trustee [*or executor*] and the defendant [*judgment-debtor*] is entitled to receive, or does receive annually, the sum of dollars therefrom.

VI. [*If it is a trust under which the creditor can only reach surplus income, state facts to show what it is, e. g.*] that the defendant [*judgment-debtor*] is a man without family, and residing at where he has been for the last three years, and still is, boarding, and the sum of dollars annually is a reasonable sum for his support, and that the sum of dollars annually is surplus income; and if the creditor is only entitled to surplus accrued, add: of which surplus dollars is in the hands of the defendant [*trustee*] already accrued, but not paid over.

WHEREFORE the plaintiff asks that the defendants be enjoined respectively from paying over and from receiving said fund [*or, so much of said income (already accrued) as is not necessary for the support of the defendant (judgment-debtor) and his family*] and that the same be applied to the satisfaction of the plaintiff's judgment and interest, and the costs of this action.

¹ See *Scott v. Nevius*, 6 Duer, 672; *Sillick v. Mason*, 2 Barb. Ch. 79; *Havens v. Healy*, 15 Barb.

296; *Cruger v. Jones*, 18 Barb. 467; *Bramhall v. Ferris*, 14 N. Y. (4 Kern.) 41.

1194. By an assignee of a judgment, against the judgment debtor and his mortgagee of personal property and an assignee to whom, by a fraudulent agreement between them, the debtor's property, including the mortgaged property, had been transferred.

I. That on or about the day of, 19.., at in the court, in and for the county of one [*plaintiff's assignor*] recovered a judgment against [*the judgment-debtor*] for dollars, which was duly given by said court, in an action [*continue as in Form 1189 to the end of paragraph III*].

IV. That on the day of, 19.., the said [*plaintiff's assignor*] duly assigned to the plaintiffs for a valuable consideration said judgment, and all rights arising therefrom.

V. That the said judgment was recovered upon debts of the said [*judgment-debtor*] contracted previous to the making of the transfer hereinafter mentioned.

VI. That the defendant [*judgment-debtor*] was a manufacturer of blank books and stationery at and kept a store there stocked with blank books and stationery, and a factory stocked with machinery and stock; the value of the said stock in the store being dollars, and of the machinery and stock in the factory being dollars, or thereabouts, the said machinery being subject to a chattel mortgage for dollars, held by the defendants [*mortgagees*] under the firm-name of S.... T.... & Co., the said W.... V.... being the active and managing partner of said firm.

VII. That subsequent to the contracting of said debts, and about the month of, 19.., the said [*judgment-debtor*] failed in business and stopped payment, and in anticipation of the said failure, and shortly previous thereto, he conspired with the defendant [*the managing partner of mortgagees*] and the defendant [*assignee*] to dispose of his property in fraud of his creditors, and to conceal or cover up the same, so that his creditors could not reach it; and, in pursuance of this scheme, and with intent to delay and defraud the said creditors, the said [*mortgagee*] and [*assignee*] mutually arranged and agreed that after the transfer should be made to said [*assignee*] as hereinafter mentioned, the said mortgage should be foreclosed, and the property sold and bid in by the said [*mortgagee*] and that the deficiency then existing between the amount of the mortgage and the price bid should be paid to him by the defendant [*assignee*]; and the defendants [*debtor, mortgagee, and assignee*]

further arranged and agreed that all the property in the said store and factory should be transferred and delivered to the defendant [assignee] at the nominal price of dollars, or thereabouts, which the said [assignee] should pay in notes, and [the debtor] should use in effecting favorable compromises with his creditors. And it was further arranged and agreed between the defendants that the defendant [assignee] should go on, in his own name, with the business previously conducted by [the debtor] and should employ said [debtor] as managing agent, at a nominal salary of dollars a year; that the business should be thus continued for two years, to give said [debtor] an opportunity to buy up at a low rate the claims against him held by his creditors, and at the end of that time said [assignee] should pay over and redeliver to the debtor all the residue of said property and effects, and the proceeds and profits thereof, after deducting dollars a year for his own compensation and the amount of the notes given as aforesaid by him. And it was further arranged and agreed that if the defendant [debtor] could procure a purchaser of said property at a fair price, the said [assignee] should sell the same to such purchaser in his own name, and after making the deduction above mentioned should pay over the balance to said [debtor].

VIII. That in pursuance of this arrangement the defendant [mortgagee] foreclosed the mortgage and bought in the property at dollars, and immediately transferred the same to said [assignee] who paid him dollars therefor, that being the amount of said mortgage; which amount the said [mortgagee] received for, and paid over to, the said firm of S.... T.... & Co.

IX. That also, in pursuance of said arrangement, the other property of said [debtor] in the factory and store was transferred by him to said [assignee] for dollars, paid in notes as aforesaid, who continued the business, employing said [debtor] as managing agent, and the said [assignee] has made a large profit thereon, and at least dollars a year; and that the said [assignee] still continues in said business, and in possession of the said goods and property, or the proceeds and profits thereof.

[*Negative collusion, as in Form 1186.*]

WHEREFORE the plaintiffs demand judgment: (1) That the transfer of his property by the defendant [debtor] to the defendant [assignee] may be adjudged fraudulent and void as against the plaintiffs. (2) That the said defendant [assignee]

be enjoined and restrained from selling, assigning, or in any way disposing of the machinery and stock in said blank book manufactory, transferred to him by said [*debtor*] or said [*mortgagee*] and the goods and stock in the store transferred to him by said [*debtor*] or the proceeds and profits thereof. (3) That a receiver may be appointed to take possession of the said property, and the proceeds and profits thereof. (4) That the said Y.... Z.... may be compelled to account to said receiver for the profits of said store and manufactory since the said transfer. (5) That the said [*mortgagees*] be compelled to pay over to said receiver dollars, being the sum received by them over and above the amount that the mortgaged machinery brought at the sale. (6) That the property taken possession of by said receiver, or collected by him, may be sold and appropriated to the payment of the judgment held by the plaintiffs. (7) And for the costs of this action.

1195. Against judgment-debtor and one to whom he fraudulently confessed judgment, to set aside judgment and sale thereunder.

I, II and III. [*Allege judgment and execution and return unsatisfied, and amount due, as in Form 1186.*]

IV. That prior to the entry of said judgment, but after the indebtedness upon which the said judgment was rendered had accrued, the said defendant [*debtor*] authorized a judgment to be entered, on confession, in the court for county against him, in favor of the defendant [*fraudulent creditor*] the father of said [*debtor*] for dollars damages and dollars costs, for a pretended indebtedness for so much money alleged to have been theretofore lent by said defendant [*debtor*] to said defendant [*fraudulent creditor*].

V. That thereafter, and about the day of, 19.., execution having been issued upon the said judgment, personal property of said [*debtor*] consisting of [*briefly describing it*] of the value of dollars was thereunder sold by public auction by the sheriff of the said county of and was struck off to said defendant [*fraudulent creditor*] at about dollars, a sum far less than its real value; who thereupon took possession, and is now in possession of the same, claiming to be the owner thereof.

VI. That afterwards, and about the day of, 19.., real property of said [*debtor*] consisting of [*briefly describing it*] was sold by auction by the sheriff of said county,

under an execution issued upon said judgment, and was struck off to the said defendant [*fraudulent creditor*] also at a price much below its real value, his being the highest bid for the same; and the said sheriff thereupon made his certificate of sale of the said real estate, to-wit, on the day of, 19.., aforesaid [and no deed or conveyance has yet been given by him, the time for such conveyance having not yet expired.]

VII. That the said last-mentioned judgment was fraudulently confessed by the said [*debtor*] to the said [*fraudulent creditor*] and for the purpose of covering up his said property, and defrauding the plaintiff in the collection of his demand. That said defendant [*debtor*] was not indebted to the defendant [*fraudulent creditor*]; but said judgment was confessed without any consideration, and the sale of said property was made with the intention, on the part of both, of defrauding the plaintiff out of his demand, and of transferring the ostensible ownership and possession of the property of said [*debtor*] liable to execution, to the said defendant [*fraudulent creditor*] so as to prevent the plaintiff, or any other creditor, from levying upon and selling any part thereof.

[VIII. That said real estate cannot be sold for more than about one-half the amount of the plaintiff's said judgment; and that the said defendant [*fraudulent creditor*] is of no pecuniary responsibility, and is possessed of little or no property other than that so bid in by him as aforesaid, and is in embarrassed circumstances and involved in debt.]

[*In Wisconsin negative collusion, as in Form 1186.*]

WHEREFORE the plaintiff demands judgment against the defendant: (1) That the said judgment in favor of the defendant [*fraudulent creditor*] and the proceedings and sale under it, and the sheriff's certificate of sale, be set aside, and declared void. (2) That the said defendants, and each of them, be enjoined from disposing of, transferring, incumbering, or in any way interfering with the said property, or any part thereof; and that a receiver be appointed, with the usual powers and duties, to whom the said defendants shall be directed to assign the said property, real and personal [and all other estate, property and effects of said defendant, *debtor*]; and who shall be authorized and directed to sell the same, or so much thereof as shall be necessary for that purpose, and apply the proceeds, or so much thereof as may be necessary, to the payment of the plaintiff's said judgment, and interest thereon. (3) And for the costs of this action; and for such other or further relief as may be just.

1196. Complaint by two creditors suing together, against debtor and his fraudulent grantee, to set aside conveyance of real estate (adapted from the complaint in *Gates v. Boomer*, 17 Wis. 455).

I, II, III and IV. [*Allege the obtaining of judgment and issue and return of execution, and amounts severally due to each of the plaintiffs, as in Form 1186.*]

V. That on and prior to the day of, 19... [*date of the fraudulent deed*] the said defendant C.... D.... was the owner in fee simple of the following described parcel of land in said district, and that on the last named date the said C.... D.... by warranty deed sold and conveyed the said land to the defendant E.... F.... without consideration, and the said defendant E.... F.... then and there accepted and received said deed and caused the same to be recorded in the office of the register of deeds of said county of on the day of, 19... .

VI. That on or about the said day of, 19... , said defendant C.... D.... also assigned and conveyed to the said E.... F.... a large amount of personal property of great value, embracing all that was then owned by the said C.... D.... within this state not exempt from seizure and sale on execution, and that since said conveyances and transfers the said C.... D.... held and owned no real or personal estate within this state subject to execution, unless the legal title thereto has been vested in some other party, or unless the same has been so secreted as to render it unavailable for the purpose of satisfying any judgment recovered against the said C.... D.... .

VII. That the lands so conveyed as aforesaid were and are of great value, and more than sufficient for the payment and satisfaction of the demands of the plaintiff hereinbefore set forth, and that at the time of the execution of the conveyances and transfers of property before mentioned the said C.... D.... was and had been for a long time a resident of the said county of ; that shortly thereafter said C.... D.... absconded from said county of , and has not since had any known place of residence within this state.

VIII. That, as plaintiff is informed and believes, the said sale and conveyance of said land, and the transfer of said personal property by the said C.... D.... to the said E.... F.... as hereinbefore mentioned, were both made by the said C.... D.... with intent to hinder and delay and defraud his creditors, including the plaintiffs, of their lawful debts and demands, of which fraudulent intent the said E.... F.... had notice

before the making of said conveyance and transfers, and that the said E.... F.... took and accepted said conveyance and transfer for the purpose of assisting the said C.... D.... in his fraudulent intent to hinder, delay and defraud his creditors, as aforesaid.

WHEREFORE [*demand for judgment as in Form 1186.*]

1197. By attaching creditor in aid of writ of attachment against fraudulent grantee, to set aside deed of real estate (adapted from Evans v. Laughton, 69 Wis. 138).

I. That the said plaintiff has a valid claim against one L.... M.... in the sum of dollars, and that an action is now pending in the court for county, in said state, in which the plaintiff herein is the plaintiff and the said L.... M.... is defendant, for the recovery of the said claim, and that the summons in said action has been served on the said L.... M...., and that the complaint therein is now on file in this court.

II. That a writ of attachment was duly issued out of this court on the day of, 19.., in said action in favor of this plaintiff and against said L.... M...., and that by virtue of said writ the sheriff of said county on the day of, 19.., levied upon certain lands in said county described as follows [*description*] and that this plaintiff has and owns by virtue of said writ of attachment and levy thereunder, a lien upon said land.

III. That the said L.... M.... has no other land or property within this state, as the plaintiff is informed and believes, out of which the plaintiff can realize his said claim.

IV. That, as the plaintiff is informed and believes, the said L.... M...., on the day of, 19.., and after the claim of the plaintiff hereinbefore mentioned had accrued, conveyed by warranty deed to the defendant C.... D.... the said land hereinbefore described, which deed was recorded in the office of the register of deeds of county, on the day of, 19...

V. That, as the plaintiff is informed and believes, the said conveyance was executed by the said L.... M.... without consideration, and with intent to hinder, delay and defraud the creditors of the said L.... M.... including this plaintiff, and that the said defendant C.... D.... accepted and received said deed with knowledge of the said fraudulent intent on the part of the said L.... M.... and with intent upon his part to assist the said L.... M.... in his said fraudulent purpose, and to hold the said lands as a secret trust for the said L.... M....

VI. That there is now actually and equitably due the plaintiff upon his said demand the sum of dollars, with interest from, 19..

[*In Wisconsin insert allegation negating collusion, as in Form 1186.*]

WHEREFORE the plaintiff demands judgment that the said deed may be set aside and adjudged fraudulent and void, and that the land therein described be adjudged subject to the lien of the plaintiff's writ of attachment aforesaid; and that the plaintiff have such other and further relief in the premises as shall be just and equitable, with costs.

1198. By judgment creditor against debtor and fraudulent grantee, to set aside fraudulent transfer of personal property (adapted from complaint in *Pierstorff v. Jorge*, 86 Wis. 128).

I, II, III and IV. [*As in Form 1186.*]

V. That, as plaintiff is informed and believes, the defendant C.... D.... was, on the day of, 19.., and for some time prior thereto, the owner of the following described personal property, to-wit [*describe tangible property conveyed*] and that said defendant at the same time was the owner of a considerable number of accounts, debts, claims and demands due him from different persons whose names are to this plaintiff unknown, and that the value of all of said personal property was about the sum of dollars.

VI. That on or about the said day of, 19.., after the commencement and immediately before the trial of the said action hereinbefore mentioned, the said defendant C.... D.... fraudulently, and with intent to hinder, delay and defraud his creditors, including this plaintiff, and to prevent the collection of any judgment which might be recovered in said action, executed a bill of sale of the said personal property, accounts and demands hereinbefore described, which property constituted all of the property owned by the said C.... D.... exempt from execution, to the defendant E.... F.... upon the alleged and pretended consideration of dollars. That, as the plaintiff is informed and believes, no consideration was in fact paid by the said E.... F.... to the said C.... D.... for the transfer of the said personal property, and that the said bill of sale was executed by the said C.... D.... solely with intent to hinder, delay and defraud his creditors, and especially this plaintiff. That the said transfer was not accompanied by an immediate and continued exchange of possession of the said property, and that since the said transfer and up to the present

time the said property has remained in the actual possession and under the control of the said C.... D...., under the false and fraudulent pretense that he is the agent of the said E.... F.... That the said E.... F.... at the time of said transfer well knew the fraudulent purpose of the said C.... D...., and accepted the said bill of sale with the fraudulent intent to aid and assist the said C.... D.... in his said fraudulent purpose, and especially with intent to prevent the plaintiff from collecting any judgment which he might recover in said action.

VII. That, as the plaintiff is informed and believes, the said defendant C.... D.... had not at the time of the making of the said bill of sale and has not since had, and has not now any other property than that embraced in the said bill of sale whatever, out of which the plaintiff's judgment can be satisfied in whole or in part, and that unless the said property can be reached and applied to the payment of said judgment the same must remain wholly unpaid.

VIII. [*In Wisconsin add allegation negating collusion, as in Form 1186.*]

WHEREFORE the plaintiff demands judgment that a receiver of all the property and effects of the said C.... D.... be appointed; that the said pretended bill of sale of said personal property may be declared null and void as against this plaintiff; and that the said property may be transferred to such receiver. That the defendants be required to account for all the moneys collected by them, or either of them, upon the accounts and demands aforesaid, and for all the proceeds arising from the sale of any of such property and pay over the same to such receiver in order that the same may be applied upon the plaintiff's said judgment. That said defendants be enjoined from disposing of any of such property, or collecting any of said accounts, and that the said receiver be ordered to take possession of and sell all the property of said C.... D.... not exempt from sale on execution, or so much thereof as may be necessary, and apply the proceeds thereof to the payment of the amount due on said judgment, as aforesaid; and that the plaintiff recover his costs and disbursements.

1199. By judgment creditor against the debtor, his wife, two other fraudulent grantees of personal property, and a banking corporation, to reach concealed personal property and moneys (adapted from the complaint sustained in *Gullickson v. Madsen*, 87 Wis. 19).

I, II, III and IV. [*Allege recovery of judgment of the plaintiff, issue of execution and return, and amount actually due, as in Form 1186.*]

V. That the defendant, Bank of is and was at the times hereinafter mentioned, a banking corporation duly organized and existing under and by virtue of the laws of the state of [*or the laws of the United States*] and doing business at the city of in said county of

VI. That on the day of, 19.., the defendant C.... D.... was the owner and in the possession of certain saloon furniture and fixtures situated in the city of county of free of incumbrances, which furniture and fixtures were reasonably worth the sum of dollars, and that on the said last mentioned day, as plaintiff is informed and believes, the said C.... D.... made, executed and delivered to the defendant E.... F.... a chattel mortgage covering the said furniture and fixtures purporting to secure the payment of the sum of dollars and caused said mortgage to be filed in the office of the city clerk of the city of on the day of, 19.., which mortgage now appears to be unsatisfied upon the records of said city clerk; that, as plaintiff is informed and believes, the said mortgage was in fact executed and delivered without any consideration whatever, and solely for the purpose of hindering, delaying and defrauding this plaintiff in the collection of his said claim against the said C.... D....

VII. That the defendant G.... H.... is the wife of the defendant C.... D...., and at the times named in this complaint had no separate estate; that the defendant C.... D.... has for many years made regular deposits in the banking house conducted by the said defendant, the Bank of aforesaid, and that since the indebtedness to the plaintiff hereinbefore mentioned accrued, the defendant C.... D.... has regularly and systematically made and now makes, his deposits in the said bank in the name of his said wife G.... H....; that the said G.... H.... does not in fact handle or control any of said money, but that the same is withdrawn from the said bank on checks of the said C.... D.... as agent for the said G.... H...., which method the said C.... D.... has resorted to solely for the purpose of defrauding, hindering and delaying his creditors, and this plaintiff in particular, in the collection of their just claims; that the said defendant, the Bank of as the plaintiff is informed and believes, now has in its possession and under its control moneys, credits and effects belonging to the defendant C.... D...., but which are deposited in the name of the defendant G.... H.... and that the same are so credited and deposited for the sole purpose of hindering, delaying and defrauding the creditors of the said C.... D....; that the said Bank of is now owing the said C.... D.... upon

certificates of deposit issued either to said C.... D.... or to the said G.... H...., and that the value of the property and credits of the said C.... D.... so held by the said bank, and the indebtedness of the said bank to the said C.... D.... upon certificates of deposit as aforesaid, exceeds the sum of dollars, as plaintiff is informed and believes.

VIII. That the said C.... D.... has no other property other than that hereinbefore mentioned whatever, out of which the plaintiff's judgment can be satisfied in whole or in part, and that the said C.... D.... unjustly refuses to apply any of the aforesaid property in satisfaction of said judgment.

IX. [*In Wisconsin insert allegation negating any collusion, as in Form 1186.*]

WHEREFORE plaintiff demands judgment that the said defendant C.... D.... be enjoined from selling or disposing of any money, property, debts, choses in action, or equitable interests belonging to him or held in trust for him, or in which he is in any way interested, and that he be adjudged to apply the same upon the judgment of the plaintiff hereinbefore mentioned; that the chattel mortgage hereinbefore mentioned, executed to the defendant E.... F.... be declared fraudulent and void, and that the same be cancelled, and that the property therein described be adjudged to be the property of the defendant C.... D....; that the defendant C.... D.... be ordered to appear before the court or a judge thereof, and under oath disclose and answer as to any and all property in which he may be beneficially interested; that the defendant E.... F.... be enjoined from disposing of or selling any of said property described in said mortgage; that the defendant Bank of be enjoined from making any payment upon the certificates of deposit aforesaid, or from paying out or disposing of any property, money or credits held by said bank to the credit of the said G.... H.... or to the credit of the said C.... D....; and that the defendant G.... H.... be enjoined from disposing of any of the property, money, credits or effects held by her as aforesaid; that a receiver of the property of the said C.... D.... be appointed by this court, with the usual powers of a receiver in such cases; and that the plaintiff have such other relief as may be equitable, with costs.

1200. By judgment creditor to set aside conveyance made prior to the creation of the indebtedness due to the plaintiff (adapted from complaint in *Shand v. Hanley*, 71 N. Y. 319).

I, II, III and IV. [*As in Form 1186.*]

V. That on the day of, 19.., and for several

years prior thereto the defendant C.... D.... was the owner and in possession of the following described lands [*insert description*], and that said lands were and still are of the value of about dollars, and were exempt from sale upon execution.

VI. That by reason of the fact that the said C.... D.... owned the said lands said C.... D.... was enabled to and did obtain credit in his business as a merchant, and that many persons including this plaintiff, sold and delivered to the said C.... D.... goods, wares and merchandise believing the said C.... D.... to be solvent and relying upon the fact of his ownership of the said real estate.

VII. That on the day of, 19.., the defendant C.... D.... secretly conveyed the said lands by warranty deed to the defendant E.... F.... without consideration, and for the purpose of hindering, delaying and defrauding his existing creditors, as well as the creditors who might thereafter extend credit to him in the prosecution of his said business, which intention was well known to the said defendant E.... F.... and participated in by him; that after the execution of the said conveyance the said defendant C.... D.... remained in continuous possession of the said premises, and in apparent ownership thereof, and that by reason of the said continuous possession and apparent ownership, the credit of the said C.... D.... was continued, and this plaintiff, relying upon said apparent ownership and possession of said property continued to extend credit to the said C.... D.... and allowed him to contract the indebtedness hereinbefore set forth on account of which the said judgment was rendered.

VIII. [*In Wisconsin insert an allegation negating collusion, as in Form 1186.*]

WHEREFORE plaintiff demands judgment that the said conveyance by the said C.... D.... to the said E.... F.... be adjudged void as to this plaintiff [*continue as in Form 1186*].

1201. By creditor to reach salary due the debtor (adapted from complaint sustained in *Kingman v. Frank*, 33 Hun, 471).

I, II, III and IV. [*Allege judgment, execution and return, and amount due, as in Form 1186.*]

V. That, as plaintiff is informed and believes, on or about the day of, 19.., the defendant E.... F.... agreed to and did employ the defendant C.... D.... [*judgment-debtor*] to manage a certain mercantile business conducted by said E.... F.... at the city of, and agreed to pay

the said C.... D...., in consideration thereof, the sum of dollars per month; that the said C.... D.... thereupon entered upon the said employment and conducted the said business in accordance with said agreement, but that said defendant E.... F.... has failed to pay to the said C.... D.... the said sum of dollars per month, as agreed, and has only paid about the sum of dollars, and that there is now due from the said E.... F.... to the said defendant C.... D.... on account of his services so rendered the sum of dollars.

VI. That the defendant C.... D.... has no property, real or personal, upon which execution can be levied for the payment of the plaintiff's said judgment, and that he wrongfully refuses to apply any part of his said salary to the satisfaction thereof.

VII. [*In Wisconsin add allegation negating any collusion.*]

WHEREFORE plaintiff demands judgment that a receiver may be appointed; that the defendant E.... F.... be required to pay the amount due from him to the said defendant C.... D.... as aforesaid, to the said receiver; and that the plaintiff's demand may be satisfied therefrom; and that this plaintiff have such other and further relief as may be proper, with costs.

1202. By judgment creditor, to reach royalties falling due from publishers to the debtor under a contract (adapted from Lord v. Harte, 118 Mass. 271).

I, II, III and IV. [*As in Form 1186.*]

V. That the defendant C.... D.... [*debtor*] is and has been for many years an author of large reputation, and has written and caused to be published works in prose and poetry which have had and still have a large and profitable sale in the United States and elsewhere and that many of said works are now being published by the defendants O.... & Co.; and upon information and belief the plaintiff alleges that the said defendant C.... D.... has assigned to the defendants O.... & Co., the copyrights of the said books, and the sole right to publish and sell the same, in consideration of a certain written contract by the terms of which contract the said O.... & Co., in consideration of the assignment to them of said copyrights, agree to publish and sell as many copies of said books as can be advantageously sold during the life of said copyrights and out of such sales pay to the said C.... D...., ... per centum upon the retail prices of said books as compensation for the authorship thereof, such compensation to be paid upon the stating of

semi-annual accounts in the months of May and November of each year.

VI. That under the terms of said contract the said C.... D.... has already received large sums as royalties, and more than enough to pay the plaintiff's said judgment; that the sale of said books is large and continuous and that the profits of the said C.... D.... under said contracts will continue for many years, but that the said C.... D.... refuses to apply any part of the sums so received by him to the payment of plaintiff's judgment, and the same cannot be reached by attachment or execution. That the amount due the defendant C.... D.... upon a proper accounting from the defendants O.... & Co., at the time of the commencement of this action, or at the time of the first accounting thereafter, will not be sufficient to discharge the plaintiff's said judgment.

[In Wisconsin add allegation negating collusion.]

WHEREFORE plaintiff demands judgment that an accounting be had, and that the sums due and hereafter to become due from the defendants O.... & Co. to the defendant C.... D.... be ascertained; that a receiver be appointed, with the usual powers; that the defendants O.... & Co., be adjudged to pay over to said receiver the said sums so due or hereafter becoming due under said contracts to said C.... D.... until the said judgment, with interest and the costs of this action, be fully discharged; and that the plaintiff have such other and further relief as may be just and equitable.

1203. By assignee in bankruptcy to recover unlawful preference, or its value.²

I. That heretofore and on the day of, 19.., one L.... M.... of duly filed his petition in the United States district court for the district of praying that he be adjudged a bankrupt pursuant to act of congress, and that pursuant to such petition said L.... M.... was by said court on said day duly adjudged a bankrupt; that thereafter and on the day of 19.., this plaintiff was duly elected and appointed by the creditors of said L.... M.... as trustee in said bankruptcy proceedings, and such election was duly approved by I.... K.... referee in bankruptcy, before

² This action may be brought by the trustee in bankruptcy under the Bankruptcy Act (U. S. Act of July 1, 1898 sec. 60 subd. b; U. S. Comp. Stats. 1901 p. 3405). It is not necessary to allege that any

creditors had filed claims in the bankruptcy proceedings, nor that it is necessary for the payment of debts that the alleged preference be recovered. *Jackman v. Bank*, 125 Wis. 465 s.c. 104 N. W. 98.

whom said proceedings were pending; that thereupon the plaintiff duly qualified as such trustee by giving the bond required by said court and taking the oath required by law, and entered upon his duties as trustee and brings this action in such capacity.

II. [*Set forth the property owned by the bankrupt during the four months preceding the filing of the petition, the indebtedness of the bankrupt to the defendant and the transfer within the four months of certain of the property, describing it, to the defendant for the purpose of giving him a preference, and the knowledge of the defendant of such purpose.*]

WHEREFORE, etc. [*The demand for judgment should be for the return of the property or its value.*]

1204. By administrator, to reach property fraudulently conveyed by his intestate.³

I. That one L.... M..., of, in the county of in said state, died on the day of, 19.., a resident of said county, and that this plaintiff was on the day of, 19.., by the court of county duly appointed administrator of the estate of said L.... M.... deceased, and has duly qualified as such administrator, and is now acting as such.

II. That for many years prior to the death of said L.... M..., and up to the date of the conveyance hereinafter set forth, he owned and was in possession of the following described real estate [*describe property*].

III. That on the day of, 19.., the said deceased executed and delivered to the defendant C.... D.... a warranty deed of said real estate which deed upon its face purported to have been executed in consideration of the payment of the sum of dollars, but as plaintiff is informed and believes, no consideration was in fact paid therefor, but that the same was executed and delivered with intent on the part of said L.... M.... to hinder, delay and defraud his existing creditors, of which intent the defendant C.... D.... was fully advised at the time he received said conveyance.

IV. That on and prior to said day of, 19.. [*date of conveyance*] said L.... M.... was justly indebted to X.... Y...., Y.... Z...., and various other persons, in large amounts, aggregating in all about the sum of dollars,

³ This action is authorized by Wis. Stats. 1898 sec. 3832; Minn. Rev. Laws 1905 sec. 3720; N. Dak. Rev. Codes sec. 6474; Cobbe's

Ann. Stats. of Nebr. sec. 5076; S. Dak. Rev. Codes P. C. sec. 250. See *Andrew v. Hinderman*, 71 Wis. 148.

which debts remained unpaid at the time of the death of said L.... M...., all of which debts will, as plaintiff is informed and believes, be proved and allowed against the estate of said L.... M.... [*or, if claims have already been allowed:* and that there have already been proven and allowed by said court of the said debts so owing by said deceased claims amounting in the aggregate to the sum of dollars].

V. That the net amount of the assets of the estate of said deceased which has come into the possession or knowledge of the plaintiff as administrator aforesaid does not exceed the sum of dollars, and that there will be a deficiency of assets to pay the just debts chargeable against said deceased, amounting to at least the sum of dollars.

VI. That the defendant threatens and is about to convey said lands to some innocent purchaser for value, without notice, and that if he should make such conveyance the estate of the said L.... M.... would be and remain insolvent, and the said creditors would thereby lose all or a large portion of their just demands.

¶ WHEREFORE plaintiff demands judgment that the said deed be declared void and cancelled; that the said defendant C.... D.... be adjudged to reconvey said lands to this plaintiff, as administrator aforesaid; and that the plaintiff have such other and further relief as may be just and equitable, with costs.

1205. By creditor against grantee of deceased debtor, when estate is insufficient to pay claims proven.*

The plaintiff, on behalf of himself and all other creditors of L.... M.... deceased who are similarly circumstanced, complaining of the defendant C.... D...., respectfully alleges:

I. That one L.... M...., of, died intestate on the day of, 19.., and that on the day of, 19.., upon proceedings duly had in that behalf, the defendant was by the court of said county duly appointed administrator of the estate of said L.... M.... deceased, and thereafter duly qualified and entered upon the duties of said office, and is now such administrator.

II. That on the day of, 19.., the said E....

* This action may be brought by a creditor who has obtained judgment, or whose claim has been allowed by the county court. Wis. Stats. 1898 sec. 3835. It may be brought whenever there is just reason to anticipate that the es-

tate will be insufficient to pay debts, but it can not be brought to trial until the insufficiency of the estate is judicially ascertained by the county court. Wis. Stats. 1898 sec. 3836; German Bank v. Leyser, 50 Wis. 259.

F...., as administrator aforesaid, duly made and returned into said court an inventory of all the real and personal property of said L.... M...., and that the property included in said inventory was duly appraised as required by law, and that the entire amount of the property, real and personal, belonging to said estate, does not exceed in value the sum of dollars, being the amount at which the same was appraised, as plaintiff is informed and believes.

III. That the said deceased, at the time of his death was justly indebted to this plaintiff in the sum of dollars, upon a certain promissory note of said deceased and that the said claim was duly presented to the court aforesaid for allowance against said estate, and was duly allowed by said court on the day of, 19.., at the sum of dollars; and that the following claims against said estate were also duly presented to and allowed by said court prior to the commencement of this action, to-wit [*give names and the amounts of claims allowed*].

IV. That there is just reason to believe, and this plaintiff does believe, that the entire estate of the said L.... M.... as set forth in said inventory will be insufficient to pay the debts of the said intestate.

V. That at the time of the contracting of the said indebtedness owing by the said deceased to this plaintiff, as well as to the other creditors aforesaid the said L.... M.... was the owner and in possession of [*here describe property fraudulently conveyed*] and that on or about the day of, 19.., the said L.... M...., without consideration and with intent to hinder and delay his said creditors, conveyed by warranty deed [*or, if personal property: by bill of sale*] the said property, to the defendant C.... D.... who well knew the said fraudulent intent of said L.... M.... and participated therein, and that the said property is now in the possession of the said C.... D.... who claims title thereto and threatens to convey and dispose of the same.

V. That there is no property, real or personal, belonging to said estate which can be applied to the payment of said debts, except the property inventoried as aforesaid, and the property so conveyed to said C.... D....

WHEREFORE plaintiff demands judgment that said defendant C.... D.... be enjoined and restrained from selling or disposing of the said [*describe property*]; that he is required to convey [and deliver] the same to said administrator, and that said administrator be directed to sell the same and apply the

proceeds to the payment of the debts of said estate, and for such other relief as may be just and equitable, with costs.

1206. By creditor of deceased debtor, to reach land purchased by the debtor, but conveyed to a third person in fraud of creditors (adapted from complaint sustained in *Allen v. McRae*, 91 Wis. 226).

The plaintiff, on behalf of himself and all other creditors of L.... M...., deceased who are similarly circumstanced, complaining of the defendant C.... D...., respectfully alleges:

I. That one L.... M...., of, in the county of, being at the time wholly insolvent and indebted to this plaintiff and others, did on the day of, 19.., purchase of one O.... P.... the following described real estate [*describe the property*].

II. That the said L.... M.... paid from his own moneys the entire consideration for the said real estate, and caused the title thereof to be conveyed to the defendant C.... D.... by warranty deed, in usual form, whereby the said C.... D.... became vested with the legal title to said property; that the said conveyance to the said C.... D.... was made and intended to be in secret trust for the sole use and benefit of the said L.... M...., pursuant to an agreement between the said L.... M.... and the said C.... D...., and with intent on the part of both said L.... M.... and said C.... D.... that the said property should be held by the said C.... D.... in trust for the said L.... M.... so that it should not be subjected to the payment of the debts of the said L.... M....; that the legal title to said land has continued to remain in the said L.... M.... by virtue of the said conveyance ever since the date thereof, and still so remains.

III. That the said L.... M...., at the time of said conveyance was indebted to this plaintiff in the sum of dollars, and was also indebted to divers other parties, to an amount aggregating about the sum of dollars, and continued to be so indebted until the time of his death, which death occurred on the day of, 19..

IV. That on the day of, 19.., the defendant E.... F...., upon proceedings duly had for that purpose, was appointed by the court of county, administrator of the estate of the said L.... M.... deceased, and duly qualified as such administrator, and ever since has been such administrator; that on the day of, 19.., this plaintiff duly filed in the said court her claim as creditor aforesaid against the estate of the said L.... M...., which claim

was duly allowed by said court at the sum of dollars, on the day of, 19..

V. That no funds belonging to said estate have come into the hands of the said administrator, and that there is no property in the possession of said administrator, or within his knowledge, out of which this plaintiff can collect his said claim.

VI. That on the day of, 19.., an execution was duly issued out of the court of county, upon a judgment in a certain action in which Y.... Z.... was plaintiff and L.... M.... was defendant, and that on the day of, 19.., said execution was duly returned wholly unsatisfied, and that this plaintiff brings this action on behalf of himself and all the creditors of said L.... M.... whose claims existed at the time of the conveyance of said real estate to the defendant C.... D...., to-wit, on the day of, 19..

WHEREFORE the plaintiff demands judgment that the defendant C.... D.... be adjudged a trustee of said land for the benefit of this plaintiff and the other creditors of the said L.... M.... existing at the time of said conveyance, and that the court appoint a receiver to sell said property, or so much thereof as may be necessary to pay said creditors, and that the said C.... D.... be required to account for the rents and profits of said real estate to said receiver from the time of said conveyance if the same shall be necessary to pay the claims of said creditors, with interest, and that the plaintiff have such other or further relief as may be equitable, with costs.

1207. Complaint by a judgment creditor against insolvent corporation and its officers, to reach unpaid stock subscriptions and corporate assets fraudulently conveyed by the officers to themselves (adapted from complaint sustained in *Pierce v. Milwaukee Construction Co., et al.*, 38 Wis. 253).

I, II, III and IV. [As in Form 1186.]

V. [*Allege corporate character and business of the corporation defendant.*]

VI. The plaintiff further alleges, upon information and belief, that the said defendant [*name corporation*] is possessed of or entitled to real and personal property, evidences of debt or things in action which are held for it by some or all of the remaining defendants named in this complaint in secret trust or under some colorable title for its benefit, but which is under the control and direction of the said corporation under some parol

or written agreement which the said corporation refuses to disclose to the plaintiff.

VII. That, as the plaintiff is informed and believes, the said defendants [*name stockholders whose subscriptions to stock are unpaid*] were at the time of the incurring of the indebtedness due to the plaintiff, and still are stockholders and directors in the said corporation by virtue of subscriptions made by them to its capital stock, to the following amounts respectively [*name amounts of stock subscribed for by each of said defendants*], but that the said defendants did not at the time of their subscriptions pay, nor have they since paid the full par value of their said subscriptions, but that a large amount is due thereon from each of the said defendants respectively, to-wit [*name amount due from each defendant, or if amounts due cannot be ascertained, say: but that the amount paid by each defendant, as well as the amount remaining due from him on said subscriptions said plaintiff has not been able to ascertain, but upon information and belief alleges that each of said defendants still owes upon his said subscriptions of stock a large amount*].

VIII. The plaintiff further alleges, upon information and belief, that at some time in the year 19. . . , the company, a corporation existing under the laws of this state, became indebted to the defendant corporation in a large sum, to-wit, the sum of about dollars, which it liquidated in whole or in part by delivering to the defendant corporation a large amount of its first mortgage bonds and other securities of great value, the exact amount of which the plaintiff cannot state; that after the delivery of the said bonds and securities, and while the said corporation defendant was insolvent and indebted to the plaintiff as aforesaid, the said defendants [*name the corporate officers charged with conveying property to themselves*] in their capacity as directors of said corporation defendant voted to and did convey and assign to themselves jointly, or to some of them individually, the said bonds and other securities, or some considerable part thereof, without consideration or for a pretended consideration which did not in fact exist, for the purpose of hindering and defrauding the creditors of said defendant corporation, and that the said bonds and securities so transferred as aforesaid are still in the possession of the said defendants [*name them*] and that the same, or the proceeds thereof ought in equity to be applied to the payment of the aforesaid debt of the plaintiff.

IX. [*Insert allegation negating collusion, as in Form 1186.*]

WHEREFORE the plaintiff demands judgment that the said defendants [*name them*] and each of them, be required to dis-

close any and all real estate or personal property held by them or either of them in trust for said corporation, or acquired by them in fraud of the creditors thereof, and that the said defendants who are stockholders in the said defendant corporation be required to disclose the amounts paid by them respectively on their subscriptions to stock, and how much thereof is still unpaid; that the said transfers of property made by the said corporation defendant to the remaining defendants in fraud of its creditors as aforesaid be cancelled and held void, and that the said directors be required by judgment of this court to turn over to the receiver to be appointed in this action all such property so held by them or either of them, and to account for the proceeds of any of such property which they or either of them have disposed of; that the said defendants, and each and all of them, be enjoined and restrained from selling, assigning or transferring any of the property of the said corporation, and any of the property assigned or conveyed to them by the said corporation in fraud of its creditors as aforesaid; that a receiver be appointed in this action to take charge of the property and effects of the said corporation defendant which may be recovered as aforesaid; that the plaintiff's said judgment be paid out of the proceeds of the said property so recovered; and that the plaintiff have such other and further relief as may be just and equitable.

CHAPTER LXXIII.

COMPLAINTS IN EQUITABLE ACTIONS TO RELIEVE AGAINST FRAUD OR MISTAKE.

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| 1208. Complaint to set aside a deed fraudulently represented to be an instrument of another character. | and repayment of advances, on the ground of fraud. |
| 1209. Complaint to set aside a deed obtained by fraud and for reconveyance. | 1212. To reform a deed by correcting mistaken description. |
| 1210. The same, another form. | 1213. The same, another form. |
| 1211. For rescission of contract | 1214. To correct mistakes in an account stated, and for judgment thereon. |

The power of a court of equity to relieve against the consequences of fraud or mutual mistake of fact, and to decree the reformation or cancellation of written instruments procured thereby is very extensive and frequently exercised. Complaint seeking relief on these grounds must clearly state the facts which constitute the fraud or the mistake, as well as the facts which exonerate the plaintiff from the charge of negligence in making the contract and laches in seeking his remedy. These facts may be so numerous and varied that forms can be hardly more than suggestive.

1208. Complaint to set aside a deed fraudulently represented to be an instrument of another character (sustained by Johnson v. Wetmore, 12 Barbour, 433).

I. That on the day of, 19.., the plaintiff was the owner of a farm situate in the town of county of [*briefly describing it*].

II. That the plaintiff, being then old, infirm, and blind, and by reason thereof incapacitated from attending properly to business, the defendants, on that day, fraudulently taking advantage of the plaintiff's said incapacity, which they well knew, procured him to sign a certain writing, without paying him any consideration therefor, and which writing they falsely and fraudulently represented to be a mere matter of form [*or state what representation was made*].

III. That the plaintiff has since, and on the day of, 19.., applied to the defendants for said writing, or for

information as to the contents thereof; but the defendants refused to allow him to see said writing, or to give him any information concerning the same. That, as the plaintiff is informed and believes, the said writing is under seal, and is a deed of said premises, and conveys the same, or some interest therein, to the defendants; and that they intend to use the same for their own benefit, and to the prejudice of the plaintiff.

WHEREFORE plaintiff asks judgment that the said deed or writing be declared void; and that the defendant produce the same, and deliver the same up to be cancelled; and that the plaintiff have such other and further relief as may be just and equitable, and that he recover the costs of this action.

1209. Complaint to set aside a deed obtained by fraud, and for reconveyance.

I. [*Allege ownership of land as in Form 1208.*]

II. That on said day the defendant applied to the plaintiff to purchase the said real estate, and as the plaintiff resided at the distance of miles from said land and knew nothing of its value, or of the improvements being made in its vicinity tending to enhance the value thereof, he applied to the defendant, who was well acquainted with the same as to its value and location, and the improvements being made in its vicinity. The defendant thereupon informed plaintiff that the land was not worth to exceed dollars, and situated miles from any settlement, and that he knew of no improvements being made in that vicinity calculated to enhance the value thereof [*or otherwise state the representations made*].

III. That relying upon said representations of said defendant, the plaintiff sold and conveyed said land to him for the sum of dollars.

IV. That at the time said defendant made the said representations the settlement extended to said land, and the city of containing three thousand inhabitants, was less than one mile therefrom, and that said premises, at the time of the execution of said deed, were well worth in cash the sum of dollars, of all which said defendant was well aware at the time he made said false and fraudulent representations, but of which plaintiff had no knowledge whatever.

V. That as soon as plaintiff discovered that said representations were false, to-wit, on the day of, 19.., he applied to the defendant and tendered to him said sum of dollars so paid for said premises, and requested him to reconvey the same to plaintiff, which he refused and still refuses to do; and that plaintiff, therefore, brings said sum of

..... dollars into court for the purpose of having the same delivered to the defendant, when he will accept the same, and reconvey said premises to the plaintiff.

WHEREFORE the plaintiff demands judgment that said defendant be required to reconvey said premises to the plaintiff, and that the title to the same may be quieted and confirmed in the plaintiff, and for such other relief as may be equitable, and for the costs and disbursements of this action.

1210. The same, another form.

I. That on the day of, 19.., the plaintiff was the owner in fee of the following described lands and premises [*describe same*] which were of the value of dollars.

II. That the defendant, on that day, offered to purchase said premises, and in order to induce the plaintiff to convey the same to him, offered to transfer and assign to the plaintiff in exchange therefor [*here describe property exchanged, as for instance: fifty shares of stock in a certain corporation known as the company*].

III. That to induce said plaintiff to make said exchange the defendant falsely and fraudulently represented to the plaintiff that [*here state the false representations of fact fully and particularly*].

IV. That in truth and in fact the representations so made by said defendant were each and all false and fraudulent, as the defendant then well knew; and that he made the same for the purpose of defrauding the plaintiff out of his said land; that [*here negative directly and specifically each false statement*] all of which the said defendant knew when he made the representations aforesaid.

V. That relying upon said false and fraudulent representations, and believing the same to be true, the plaintiff accepted the defendant's offer, and on the day of, 19.., in consideration of the transfer of said property by defendant to him, the plaintiff made, executed and delivered to the defendant a deed of warranty of the above described premises [of which deed a copy is hereto annexed, marked Exhibit A and made a part of this complaint], and thereupon let the said defendant into possession of said premises which the defendant now holds.

VI. That the said deed was afterwards, on the day of, 19.., duly recorded in the office of the register of deeds for county in book D of deeds, on page

VII. That the plaintiff did not discover the falsity of said representations so made to him by the defendant until the day of, 19.., on which day he tendered back to the

defendant [*or offered to return to the defendant*] the said personal property so delivered to plaintiff by the defendant [*with a properly executed assignment thereof*] and demanded that defendant reconvey the said premises to him, this plaintiff, [*and presented to the defendant a quit claim deed, duly filled out and ready to be signèd and executed for that purpose*] and demanded that the defendant give up to the plaintiff the possession of said premises, but that the said defendant wholly refused and still refuses to reconvey said land, or to give up the possession thereof.

VIII. That the plaintiff still has said property so transferred to him by defendant and [*if property is capable of surrender into court: now brings the same into court for the benefit of defendant; or if not: is ready and willing to deliver the same to defendant, as the court shall direct*].

WHEREFORE the plaintiff demands judgment that said conveyance be cancelled, and that the defendant be adjudged to reconvey the said premises to the plaintiff, and deliver possession thereof to the plaintiff; and for such other relief as may be equitable, and for the costs of this action.

1211. For rescission of contract and repayment of advances, on the ground of fraud (see *Belknap v. Seely*, 14 N. Y. 143).

I. That the plaintiff, on the day of, 19.., bargained with the defendant to buy of the defendant a piece of ground at [*briefly designating it*] which was chiefly valuable for the purpose of dividing into city lots, and purchased by the plaintiff for that purpose, as defendant well knew.

II. That the defendant, well knowing said premises to contain a much less quantity than acres of land, viz. acres only, then and there falsely and fraudulently represented to him that the premises contained acres; and falsely and fraudulently induced him to buy the said premises for dollars.

III. That plaintiff, relying on said representations, agreed in writing to buy the premises, and paid defendant dollars, part of the purchase money thereof.

IV. That the premises did not contain acres, but only acres; whereby the plaintiff was deprived of all the benefit and advantage which he otherwise would have derived from the said sale.

V. That on or about the day of, 19.., as soon as he had ascertained that the said representations were untrue, he tendered to defendant a duly executed quit claim deed of said

lands, and demanded of defendant the rescission of said agreement and a return of said dollars, but defendant refused and still refuses to consent thereto.

WHEREFORE the plaintiff demands judgment for dollars, with interest from the day of, 19..; that the said agreement of purchase be delivered up and cancelled; and that the plaintiff have such other and further relief as may be equitable, with the costs of this action.

1212. To reform a deed by correcting mistaken description.

I. That on the day of, 19.., the defendant executed and delivered to the plaintiff, under his hand and seal, a deed, of which the following is a copy [*give exact copy of deed with erroneous description*].

II. That the description therein given of the premises intended to be conveyed thereby was erroneous, and in fact does not describe any premises whatever; that the word "southerly," as last used in said description, was inserted by mistake of the parties to said deed [*or otherwise; and if fraud is relied on, the circumstances of it should be specially stated*], instead of the word "northerly" which should have been used instead thereof; and that in order to make said deed pass any premises whatever to this plaintiff, and to make it conform to the actual intentions of the parties, it is necessary that the said description should be amended by substituting the word "northerly" for the word "southerly," where the latter word is last used therein [*or say: amended so as to read as follows, and insert description in full as amended*].

III. That the plaintiff has paid to the defendant for the said premises the consideration expressed in said deed.

WHEREFORE this plaintiff demands judgment that said deed be reformed as aforesaid, and for such further relief as may be just, with costs.

1213. The same, another form.

I. That on or about the day of, 19.., the plaintiff and defendant negotiated a bargain and sale by defendant to plaintiff of the following described premises, to-wit, [*describe premises*] for the sum of dollars to be paid by plaintiff.

II. That in pursuance of said agreement, the said defendant on said day executed and delivered to the plaintiff a deed of warranty, intending thereby to convey the premises above described, and the plaintiff thereupon paid said sum of dollars, the consideration for said premises, believing that he

was receiving a deed of the premises above described, and immediately caused the same to be recorded in the office of the register of deeds for county, on the day of, 19.., in volume of deeds, on page

III. That by mistake of the parties in the drafting of said deed, the premises were erroneously described therein as [*state description in deed*] instead of the premises to be conveyed as aforesaid, and that the defendant did not in fact own the premises actually described in said deed or have any interest therein.

IV. That it is necessary that the said deed be reformed so that the description therein shall read as follows [*here give true description of land intended to be conveyed*].

V. That the plaintiff, on the day of, 19.., requested the defendant to execute a deed in correction of said mistake [and tendered him for execution a warranty deed containing the proper description, and requested him to execute the same] but he refuses so to do.

WHEREFORE the plaintiff demands judgment that said deed, executed and recorded as aforesaid, be reformed so as to correctly describe the premises intended to be conveyed, and for such other relief as may be agreeable to equity, and for the costs of this action.

1214. To correct mistakes in an account stated, and for judgment thereon.

I. That the plaintiff and defendant, having had mutual dealings, afterwards, on the day of, 19.., came to a mutual accounting, upon which a statement of the said account was made in writing, of which a copy is annexed as a part of this complaint, whereby a balance of dollars was found to be due from the plaintiff to the defendant [*or, from the defendant to the plaintiff*] on final adjustment.

II. That since the said statement of account the plaintiff has discovered errors and false charges [*or, credits, or both*] therein, of which he was wholly ignorant at the time of such settlement.

III. That in the statement of said account so settled he is charged [*here state the items wrongfully charged, and show what is the error*].

IV. That the following items, which ought to have been entered to his credit in said account, were wholly omitted therefrom, by mistake and oversight, to-wit [*here set forth the items, with date, amount, etc.*]

V. That the following items are erroneous in amount, in this: that the credit for should have been of dollars,

instead of only dollars [*stating briefly the grounds why it should have been more*].

VI. That the said account ought to be corrected as above mentioned; and the balance thereon ought to be dollars in favor of the [plaintiff] instead of being dollars in favor of the [defendant].

VII. That as soon as the plaintiff discovered the said mistakes and errors, he called on the defendant, on the day of, 19.., and pointed the same out to him, and then requested the defendant to correct the same, and to restate the said account, with the mistakes and errors aforesaid corrected; but the defendant refused to do so, or to pay the plaintiff any part of said sum of dollars, due to him at the time said account was stated [*or, and to accept the sum of dollars from the plaintiff in full payment of said account*].

WHEREFORE the plaintiff demands judgment that he may be allowed to prove the said errors and mistakes in the stating of said account, and that the same be restated; that judgment may be rendered against the defendant for the balance of dollars due him on said corrected account, with interest thereon from the day of, 19.., with the costs of this action.

CHAPTER LXXIV

COMPLAINTS IN ACTIONS TO DISSOLVE PARTNERSHIP.

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| <p>1215. To dissolve partnership for various causes.</p> <p>1216. The same, alleging misappropriation of funds by the defendant.</p> | <p>1217. By administrator of deceased partner, against the survivor.</p> <p>1218. To dissolve an insolvent partnership when the partners cannot agree.</p> |
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1215. To dissolve partnership for various causes.

I. That on the day of, 19.., the plaintiff and the defendants [*copartners*] formed a partnership for the purpose of [*state business*] under articles of copartnership, of which a copy is annexed and made part of this complaint, and marked Exhibit A. [*Or, if the agreement was not in writing, state its effect briefly, e. g.: under an agreement that the plaintiff should contribute the use of dollars capital, and that the plaintiff and the defendants [*copartners*] should co-operate in the care and labors of the business, and that the plaintiff should receive one-half of the net profits, and upon a dissolution of the partnership, repayment of his capital, and that the defendants should receive each one-quarter of the net profits.*]

II. That the plaintiff and defendants now own a valuable lease of premises No., ... Street in, and a large and valuable stock of goods; that they have also a large amount of debts due them, and a valuable good-will, which are of far greater value when taken together than if separated; and that no equitable divisions of the assets and good-will of said partnership can be made without great loss to all parties, except by a sale thereof together, and a division of the proceeds thereof.

III. [*Where the dissolution was by an assignment, say: That on the day of, 19.., the defendant [*a partner*] without the knowledge or assent of the plaintiff, by writing assigned and transferred to the defendant [*assignee*] all his interest in said partnership, and all his right and title to any and all property belonging to said firm; whereby said partnership became dissolved.*]

[*Or, where the dissolution is by exclusion of the plaintiff: That on the day of, 19.., the defendant, a partner,*

took exclusive possession of the partnership books and stock, and then and ever since has prevented the plaintiff from having access to the same.]

[*Or, where the dissolution is upon notice given by one of the partners:* That on the day of, 19.., the defendant, or plaintiff, pursuant to the provision of said agreement, gave to the defendant or plaintiff a written notice of his intention to dissolve said agreement, of which a copy is annexed as a part of this complaint, and marked Exhibit B.]

[*Or, where the dissolution is on the ground of the insolvency or arrest of a partner:* That the defendant before this action and on or about the day of, 19.., became insolvent, was arrested on the day of, 19.., at the suit of one M.... N.... for a debt of dollars [and in consequence of such arrest, has ever since been a prisoner at]; and that by reason of such insolvency [and arrest] the partnership has been greatly discredited, and has sustained loss by the absence of said defendant therefrom.]

WHEREFORE the plaintiff demands judgment that the said partnership be adjudged dissolved; that a receiver of the property, rights and good-will of said partnership be appointed, with power to dispose of the same, and to collect all debts for the benefit of all parties entitled thereto, and that the proceeds thereof be divided, after payment of all just debts of said partnership and the costs of this action, between the parties hereto, according to their respective rights; and for such further relief as may be just.

1216. The same, alleging misappropriation of funds by the defendant.

I. [*As in preceding form.*]

II. That said plaintiff and defendant entered upon, and have ever since continued to carry on the said copartnership business, under and in pursuance of said agreement, no other articles or instrument having ever been executed between them.

III. That since the commencement of said partnership, the defendant has, from time to time, applied to his own use, from the receipts and profits of said business, large sums of money, greatly exceeding the proportion thereof to which he was entitled, and in order to conceal the same said defendant, who has always had the management of the copartnership books, has never balanced said books.

IV. That on or about the day of, 19.., the plaintiff discovered that the defendant was greatly indebted to said copartnership, by reason of his applying the copartnership

moneys to his own use, as aforesaid; that the plaintiff then requested the defendant to pay all copartnership moneys that he received into the Bank, in which the copartnership was accustomed to keep its accounts, and to draw therefrom only such sums as such copartnership had occasion for; that said defendant wholly disregarded said request, and continued to apply the copartnership moneys received by him to his own use, without depositing the same in said bank, or any other bank, to the credit of the firm, and has also taken to his own use moneys received by the clerks of said firm, and has by such means greatly increased his debts to the copartnership, without affording to the plaintiff any adequate means of ascertaining the true state of his accounts.

V. That the defendant has received the sum of dollars over and above his due proportion of the copartnership profits, and that he continues to collect the copartnership debts and appropriate the moneys to his own use.

WHEREFORE the plaintiff demands judgment: (1) That the said copartnership may be dissolved, and an account taken of all the said copartnership dealings and transactions from the commencement thereof, and of the moneys received and paid by the plaintiff and defendant respectively in relation thereto. (2) That the property of the firm, real and personal, be sold, and the copartnership debts and liabilities be paid off, and the surplus, if any, divided between the plaintiff and defendant, according to their respective interests. (3) That in the meantime the defendant may be enjoined from collecting or receiving or in any manner interfering or intermeddling with, or disposing of the partnership debts or moneys, or other property or effects of said partnership. (4) That a receiver of the partnership moneys, property, and effects may be appointed, with the usual powers and duties. (5) And for such other and further relief as may be just, with the costs of this action.

1217. By administrator of deceased partner, against the survivor.

I. [*As in Form 1215, substituting decedent's name for the words "the plaintiff."*]

II. That the said copartnership business was entered upon pursuant to said agreement, and continued to be carried on under and pursuant to the same up to the time of the death of the said [*decedent*] which occurred on the . . . day of, 19. . ., said [*decedent*] having advanced large sums of money towards the capital stock.

III. That at the time of the death of the said [*decedent*] there was on hand partnership assets to the amount or value of about dollars, as follows: a large amount of personal property, consisting of [*name it*] of the estimated value of dollars; real estate situated [*describe it*] of the estimated value of dollars; together with book-accounts, notes, and other demands of the estimated value of dollars; and the debts and liabilities of said firm amounted to about dollars.

IV. [*Allege appointment of executor or administrator as in Form 542 or 544.*]

V. That ever since the death of said [*decedent*] the said defendant has continued, individually, in the possession of the store and all said real and personal property, and to manage and carry on said business, and dispose of said stock, and to collect the debts and things in action, and to pay debts and liabilities of said firm out of the avails thereof; and he has so collected large sums, the amount of which the plaintiff does not know and cannot ascertain.

VI. That said defendant has not paid over to said plaintiff, as administrator of the estate of said [*decedent*] any moneys or other proceeds of said copartnership since the death of said [*decedent*] [except dollars]; nor has he assigned, transferred, or delivered over to said plaintiff any of the assets, securities, or other property of said copartnership [except, etc., *describing what has been delivered, if any*].

VII. That within a few weeks last past, said defendant has become embarrassed in business, and has stopped payment, and is unable to give any security for the payment to the plaintiff, as the representative of said [*decedent*] of the value of the interest of said [*decedent*] in said copartnership.

VIII. That the plaintiff has requested of said defendant a statement and account of said copartnership transactions, which the defendant refused to give; and that he has offered defendant to settle and wind up the affairs of said late copartnership in the matter specified in said agreement, which he has neglected to do.

WHEREFORE the plaintiff demands judgment: (1) That an account may be taken of all the said copartnership dealings and transactions, from the time of the commencement thereof to the time of dissolution by the death of said [*decedent*] and an account of the moneys received and paid by the said partners respectively in regard thereto; that the defendant may account with the plaintiff for all his dealings with, and transactions in regard to the property, assets, and effects of said firm since its

dissolution by the death of said [*decedent*] and the property sold or disposed of by him, either as surviving partner or otherwise, and of the moneys collected and received and paid out by him on account thereof. (2) That the defendant may be adjudged to pay the plaintiff, as administrator aforesaid, what, if anything, shall upon the taking of the said accounts appear to be due the said plaintiff as such administrator of said [*decedent*]; the said plaintiff, as administrator aforesaid, being ready and willing, and hereby offering to pay the defendant what, if anything, shall appear to be due him on such accounting. (3) That a receiver be appointed, with the usual powers and duties, and under the usual directions; and that the defendant may be restrained by order of this court from disposing of, or in any manner interfering with, the property and effects of said firm, or from collecting or receiving the copartnership debts or other moneys coming to said firm. (4) For such other or further relief as may be just, with costs of this action.

1218. To dissolve an insolvent partnership when partners cannot agree.

I and II. [*As in Form 1215.*]

III. That said firm is indebted to an amount exceeding dollars, and is insolvent and unable to meet its obligations, and that both the plaintiff and defendant are also insolvent.

IV. That a considerable part of said firm property to-wit [*name property*] is covered by chattel mortgages heretofore duly executed by the parties to creditors of said firm and duly filed in the proper office, which are now due and payable, and which said creditors threaten at once to foreclose by taking possession of and selling the said property.

V. That sundry unsecured creditors of said firm are also threatening and about to commence actions against said firm, and attach its property, and that the parties are unable to agree upon the method of conducting the business of said firm or of winding up the affairs thereof.

VI. That unless the said firm be dissolved and its property and affairs administered by a receiver appointed by the court, its property will be sacrificed at forced sales and great injury will thereby result not only to the parties, but also to the creditors of said firm.

WHEREFORE, etc. [*prayer for judgment as in previous forms in this chapter.*]

CHAPTER LXXV

COMPLAINTS IN ACTIONS TO SEQUESTRATE PROPERTY OF A DOMESTIC BUSINESS CORPORATION, WIND UP ITS AFFAIRS AND ENFORCE LIABILITIES OF OFFICERS AND STOCKHOLDERS.

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| <p>1219. Complaint by creditor of insolvent corporation against the corporation and its stockholders, to sequestrate assets and enforce payment of stock subscription.</p> <p>1220. Complaint by corporation creditor against the corporation and its officers, to sequestrate assets, enforce stock subscriptions, and set aside a fraudulent assignment for the benefit of creditors.</p> <p>1221. Complaint by stockholder or creditor, to close up the business and sequestrate the property of an insolvent state bank.</p> <p>1222. Supplemental complaint filed by leave of court by an intervening creditor in an action brought by a stockholder to sequestrate the bank property; in which</p> | <p>supplemental complaint directors and officers are brought in, and claims to recover corporate property lost or squandered by them litigated.</p> <p>1223. Amended complaint in creditor's action against insolvent bank and its officers, to sequestrate property and enforce statutory and common-law liabilities of the stockholders and officers.</p> <p>1224. Complaint by creditor of insolvent business corporation to enforce liability of stockholders for wages due employees under Wis. Stats. 1898 sec. 1769.</p> <p>1225. Complaint by creditor against insolvent bank and stockholders to enforce additional liability of stockholders under the banking law.</p> |
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In Wisconsin the law with regard to sequestration actions against domestic corporations and the enforcement of statutory and common-law liabilities of officers, stockholders and third persons fraudulently colluding with officers or stockholders is quite well settled by the provisions of Wis. Stats. 1898 secs. 3216 to 3228 and acts amendatory thereof, and the various decisions made thereunder.

Independently of the statute, a common law creditor's action to reach non-leviable assets of a domestic business corporation

may doubtless still be commenced [*see Chapter LXXII of this work*], but it will be superseded by an action subsequently commenced under the statute, by virtue of the provisions of sec. 3227, *supra*. *Pierce v. Mil. C. Co.*, 38 Wis. 253.

Under the statutes there may be said to be three general forms of action: (1) Under secs. 3216 and 3217 a judgment creditor with execution returned unsatisfied, may maintain a sequestration action against any domestic business corporation, and may join delinquent stockholders and officers, obtain a receiver and collect and distribute the assets to all creditors; such an action is within the general powers of a court of equity, in the absence of a statute, but the statute recognizes and supplements the pre-existing right. *Adler v. M. P. B. M. Co., et al.*, 13 Wis. 57. (2) Under secs. 3218 *et seq.*, a sequestration action may be commenced against any insolvent banking or insurance corporation by the attorney general on behalf of the state, or by any creditor or stockholder of the corporation, and the creditors need not have obtained a previous judgment. *Hurlbut v. Marshall*, 62 Wis. 590. This action is brought for the benefit of all creditors, and is to reach all assets of the corporation, all liabilities of stockholders, officers and other persons who have corporate property in their possession, and apply the same to the payment of debts. The corporation should be made a party in either of the cases above referred to, unless its assets have been wholly exhausted or it has been dissolved, in which case the fact should be stated in the complaint. Both this and the first form of action may be commenced in simple form and even against the corporation alone, without joining all of the parties against whom relief may be ultimately sought or obtained, the idea being that by the appointment of a receiver and the obtaining of an injunctive order the corporate assets shall be at once impounded and conserved; but they are both potentially actions for the enforcement of all the creditor's rights against the corporation, its stockholders, officers, and third persons in possession of the corporate property, and for the marshalling of the assets and the payment of the debts, and are exclusive of all other actions for these purposes. In order to effect this result the court will freely allow supplemental pleadings to be served, new parties to be brought in, and will even substitute new plaintiffs, as the case may require. *Gager v. Marsden*, 101 Wis. 598 s.c. 77 N. W. 922; *Boyd v. Mut. F. Co.*, 116 Wis. 155 s.c. 90 N. W. 1086 s.c. 94 N. W. 171; *Harrigan v. Gilchrist*, 121 Wis. 127-274 s.c. 99 N. W. 909. A personal cause of action by one creditor against a corporate officer for deceit cannot be joined. *Killen v. Barnes*, 106 Wis. 546 s.c. 82 N. W.

536. It was held in *Clarke v. Banner, etc. Co.*, 50 Wis. 416, that in an action brought under sec. 3216 third persons to whom corporate property had been fraudulently transferred could not be made parties. This ruling was, however, indirectly overruled by subsequent cases, and directly by the case of *Harrigan v. Gilchrist*, *supra*, pp. 272 *et seq.* (3) In addition to these sequestration or winding up actions the statutes of Wisconsin provide for an action in equity by a creditor against officers or stockholders of an insolvent corporation, to enforce liabilities created by law, in which the corporation may or may not be joined, at the election of the plaintiff. Wis. Stats. 1898 secs. 3223-3224. This action is not a sequestration action. It may be brought by a creditor without previous judgment, for the benefit of all creditors, or all of the class in favor of which the liability exists. *Sleeper v. Goodwin*, 67 Wis. 577 s.c. 31 N. W. 335. It is not necessary in this case that the assets of the corporation be exhausted, but it must appear that the liability of the stockholders will necessarily have to be resorted to to pay the corporate debts, and all the stockholders should be made parties. *Booth v. Dear*, 96 Wis. 516 s.c. 71 N. W. 816; *Williams v. Melvy*, 97 Wis. 561 s.c. 73 N. W. 40. If the corporation is not made a party defendant, sufficient reason for the omission should be shown. *Booth v. Dear*, *supra*. If there be parties or property that cannot be reached in the first action brought an additional action may afterward be maintained. Laws Wis. 1901 c. 129.

In Minnesota the statutes regulating sequestration actions against corporations are quite similar to the Wisconsin provisions, and have received a substantially similar construction. Minn. Rev. Laws 1905 sec. 3169 *et seq.*; *Arthur v. Willins*, 44 Minn. 412 s.c. 46 N. W. 851.

In North Dakota the statutory provisions for sequestration actions are quite similar to the provisions in Wisconsin. N. Dak. Rev. Codes secs. 5761-5774.

In South Dakota, in the absence of direct statutory provision, it has been held that a creditor's action at common law may be brought against the corporation, its officers, stockholders, and third persons, to reach concealed assets or misappropriated property, but in case a receiver has been appointed in supplementary proceedings the action must be brought by the receiver. *South Bend T. & M. Co. v. P. F. & M. Ins. Co.*, 4 S. Dak. 179 s.c. 56 N. W. 98. The statute makes stockholders individually liable for the corporate debts to the amount unpaid on their stock to be recovered in a joint or several action by a creditor. S. Dak. Rev. Codes C. C. sec. 441.

Doubtless the common law remedy to sequester the property of an insolvent corporation and reach concealed or fraudulently conveyed assets in the hands of officers, stockholders or their confederates in an action in equity brought by a judgment creditor who has exhausted legal remedies, for the benefit of all creditors, still exists in all jurisdictions where it has not been abolished by statute. Maxwell on Code Pleading, p. 168.

1219. Complaint by creditor of insolvent corporation against the corporation and its stockholders, to sequester assets and enforce payment of stock subscription (adapted from complaint sustained in Alder v. Milwaukee P. D. Co., 13 Wis. 57).

I, II, III and IV. [*As in Form 1186.*]

V. [*Allege corporate character and business of the defendant corporation.*]

VI. Upon information and belief, the plaintiff alleges that the above named defendants [*name defendants who are stockholders and have not paid their subscriptions*] on or about the day of, 19.., became subscribers to the capital stock of the said defendant corporation, and stockholders therein to the following amounts, respectively [*name stockholders and the amount of their respective subscriptions*], and the plaintiff further alleges, on information and belief, that the said last named defendants have only paid a very small amount, not exceeding ten per cent, of the capital stock by them subscribed, respectively, as above set forth, and that the remaining amounts of capital stock subscribed by them still remains due and unpaid.

VII. That the said defendant corporation, on or about the day of, 19.., entered into the business of manufacturing and selling [*name the business of the corporation*] during the years 19.. and 19.. and up to the month of June, 19.., at which time the said defendant corporation became, and ever since has been, insolvent, and has ceased to do business.

VIII. Plaintiff further alleges, upon information and belief, that the defendants E.... F.... and G.... H.... are insolvent, and that there may be other defendants who are irresponsible and insolvent; and the plaintiff alleges that there are, as he is informed and believes, other creditors of said defendant corporation whose claims and demands are unpaid, and for whose benefit this action is prosecuted as well as for the benefit of the plaintiff.

WHEREFORE plaintiff demands judgment that an account may be taken of the amounts due from said defendant corpora-

tion to all persons who may elect to come in and prove their claims as creditors of the said corporation; that an account may also be taken of the amounts, respectively, paid by the said defendants, as stockholders of said company, of the amount of their respective subscriptions to stock, and the amounts yet unpaid by each of said defendants upon said subscriptions; that it may be ascertained who, if any, of said defendants are insolvent and irresponsible, and that said defendant stockholders be decreed to pay the balance so found unpaid on their respective stock subscriptions, or so much thereof as may be sufficient to pay the debts of the said company, ascertained as aforesaid, besides the costs of this action, taking into account the irresponsibility and insolvency of any of said defendants; that a receiver may be appointed to receive the said several sums of money so decreed to be paid by said several defendants, and to distribute the same among the said creditors of said company, according to the order and direction of this court, and that the plaintiff have such other and further relief in the premises as may be just and equitable.

1220. Complaint by corporation creditor against the corporation and its officers, to sequester assets, enforce stock subscription, and set aside a fraudulent assignment for the benefit of creditors (adapted from complaint sustained in *Powers v. Hamilton Paper Company*, 60 Wis. 23).

I, II, III and IV. [*As in Form 1182.*]

V. [*Add allegation of corporate character of the corporation defendant.*]

VI. That said defendant corporation is largely indebted to various persons and corporations, and is wholly insolvent, and this plaintiff brings this action on behalf of all such creditors as shall come in under the same and exhibit their claims and become parties to this action.

VII. That, as the plaintiff is informed and believes, the said defendants E.... F.... and G.... H.... and J.... K.... were and still are stockholders and directors in the said corporation defendant, and that they and each of them became such by subscribing to its capital stock, but did not at the time of said subscription, nor have they since, paid up the full par or nominal value thereof, but that a large amount is due from each of them, respectively, upon their respective stock subscriptions to the said corporation defendant, and said plaintiff alleges that whatever sums are due from said defendants respectively upon said subscriptions is in law an asset of the said corporation

defendant, and ought in equity to be marshalled and applied in satisfaction of the corporate debts aforesaid of the said defendant, but that the amount which each of said defendants subscribed, and the amount paid on said subscriptions, as well as the amount remaining due thereon, said plaintiff cannot ascertain and is unable to state, but alleges that the same is a large amount.

VIII. The plaintiff further alleges, upon information and belief, that the said defendants E.... F...., G.... H.... and J.... K.... were and are the only stockholders and directors of said corporation, and that the said defendants, on or about the day of, 19.., called and held a meeting of the stockholders of said corporation, at which by resolution introduced and passed they determined that the said corporation was insolvent, and further determined that an assignment for the benefit of the creditors of said corporation of all its property and effects be made, with preferences, and that pursuant to said resolution, and on the day of, 19.., the said E.... F...., as president and secretary of said corporation, executed and delivered a certain assignment for the benefit of creditors, to one L.... M.... whereby the said corporation defendant purported to grant, bargain, sell and transfer to the said L.... M.... all and singular its goods and property of every description, in trust for the benefit of the creditors of said corporation, which said assignment was in form executed in pursuance of the laws of the state of governing voluntary assignments for the benefit of creditors, and the said L.... M.... accepted the said assignment and entered upon the duties of his trust, and gave bond in due form, as required by the laws of said state.

IX. That the said assignment so made by said corporation was in fact made with the intention to hinder, delay and defraud this plaintiff and the other creditors of said corporation defendant, and for the purpose of securing to the directors of said corporation illegal and inequitable preferences. That, as this plaintiff is informed and believes, among the debts listed in the schedule of debts attached to the said assignment, the debt of one Y.... Z.... for dollars was not in fact a debt of the said corporation, but a debt owing by the said E.... F.... and G.... H.... individually, and that by the said assignment so made the said defendants E.... F.... and G.... H.... procured for themselves, to the detriment of this plaintiff and of the other creditors of the said corporation defendant payment of their said individual debt, or a part thereof, out of the assets of the said corporation, and that by reason of the

said unlawful preference and payment so provided for the said assignment became and is fraudulent and void as to this plaintiff.

WHEREFORE the plaintiff demands judgment that the defendant corporation be declared insolvent; that its stock, property and things in action be sequestered by the court, and that a receiver of the same be appointed, with the usual powers of receivers in such cases; that the amounts of the subscriptions to the capital stock of the said corporation defendant still unpaid by the said E.... F...., G.... H.... and J.... K.... be ascertained and determined, and that the said last named defendants be adjudged to pay to the said receiver the amounts so found due and owing from them, respectively, for such unpaid subscriptions; that the said L.... M.... be directed to convey to the said receiver all property by him held as assignee under the said assignment hereinbefore set forth, and that the court make a just and fair distribution of the property of the said corporation defendant among its creditors, as by law provided; and that the plaintiff have such other and further relief as may be just and equitable.

1221. Complaint by stockholder or creditor, to close up the business and sequester the property of an insolvent state bank (adapted from first complaint in Gager v. Marsden, 101 Wis. 598).

I. That the above named defendant is a corporation duly organized under and pursuant to the laws of the state of Wisconsin, in the month of April, 19.., for the purpose of carrying on a banking business, in the city of in the county of and state of; that the authorized capital of said bank was the sum of dollars; that all of the capital stock of said bank was duly subscribed; that immediately after the organization of said defendant, as such bank, it commenced business in the city of in the county of and state of and from that time to the day of, 19.., carried on the business of banking in said city.

II. This plaintiff further shows that he is a stockholder in said bank and a creditor thereof; that he is the owner of shares of the capital stock of said bank, of the nominal value of dollars per share, and that the said bank is indebted to him in the sum of dollars.

III. This plaintiff further shows that in carrying on its said business the said defendant has become and now is wholly insolvent and unable to pay its debts, and this plaintiff states, upon information and belief, that the liabilities of said bank are about dollars, and that its assets and property

amount to the sum of about dollars; that the said defendant is wholly unable to pay its said indebtedness and is wholly insolvent; that this action is commenced by this plaintiff for the purpose of closing up the business of said bank and causing a just and fair distribution of the property of the said bank to be made among its creditors, and that the receiver heretofore appointed in this action has entered upon the discharge of his duties and has taken possession of the assets and property of said bank.

WHEREFORE this plaintiff prays the judgment of this court, adjudging and declaring the corporate rights, privileges and franchises of the said defendant forfeited; that the business of said defendant be closed up, under the direction of this court; that the receiver heretofore appointed by this court be authorized and directed to collect the assets of said bank and convert the same into money, and hold the same subject to the order of this court; that the said defendant and all persons having any property or assets of the said defendant in their possession deliver the same to the said receiver; that the said defendant make, execute and deliver to the said receiver good and sufficient deeds of conveyance, of all real estate owned by the said defendant, and good and sufficient assignments and conveyances of any and all right, title and interest in or to any real estate belonging to the said defendant; that said receiver be also authorized and directed to collect all claims and demands of every kind, due or owing to the said bank from any and all persons and corporations, and hold and retain the same, subject to the order of this court; that a fair and just distribution of the property of the said defendant, or of the proceeds thereof, be made among the creditors of the said defendant, in the manner provided by law; that each and every of the creditors of the said defendant be required to exhibit to this court, and file in the office of the clerk of this court, each and every of their claims and demands against the said defendant, duly verified, and become parties to this action, in the manner required by law; that in default thereof, they and each of them so in default, be wholly precluded from all benefits of the judgment which shall be made and entered in this action, and from the distribution which shall be made under such judgment; that the creditors of the said defendant, and each and every of them, be restrained and enjoined, by the order of this court, from exercising any of the corporate rights, privileges or franchises of the said defendant, and from collecting or receiving any debts or demands, or from paying out, or in any way transferring or delivering to any person, any of the moneys, property or ef-

fects of the said defendant; that the creditors of the said defendant, and each of them, be restrained and enjoined, by the order of this court, from commencing any action or proceedings against the said defendant to collect their said claims against the said defendant without the order of this court, and that the said plaintiff have such other or further relief in the premises as shall be just and equitable.

1222. Supplemental complaint filed by leave of court by an intervening creditor in an action brought by a stockholder to sequester the bank property; in which supplemental complaint directors and officers are brought in, and claims to recover corporate property lost or squandered by them litigated (adapted from second complaint in *Gager v. Marsden*, 101 Wis. 598).

And now come the above named plaintiffs, on their own behalf, and on behalf of all other persons who have since the commencement of this action been made parties plaintiff thereto, and on behalf of all other creditors of said bank who may choose to be made parties hereto, and upon leave duly granted, make and file this amended complaint, and hereby allege and show:

I. That the said defendant, the Bank of was on or about the day of, 19.., duly incorporated under the laws of the state of as a banking corporation, and existed and did business as such bank at in the county of and state of from the time of its organization until it closed its doors and ceased to do business, as hereinafter alleged.

II. Plaintiffs further allege that said defendant, Bank of is, and was at the time of the commencement of this action, indebted to said plaintiff A.... B.... in the sum of dollars; to the said plaintiff C.... D.... in the sum of dollars, and to the said plaintiff E.... F.... in the sum of dollars; and to the said plaintiffs G.... H.... and J.... K...., as copartners under the firm name of H...: & K.... in the sum of dollars; and that the indebtedness due to each of said several persons and copartnership above named is for a balance of various sums deposited, in the usual course of business, by said several persons and copartnership, respectively, in said defendant, Bank of; and that the indebtedness to each of said several persons and copartnership was due and owing to him, or them, respectively, at the time of the commencement of this action, and has ever since been, and now is, so due and owing, and that prior to the day

of, 19..., no demand had ever been made for any of said balances.

III. That said defendant, the Bank of is also indebted to a large number of persons other than these plaintiffs who have already been made parties hereto, but whose names as parties to this action have been omitted herefrom, for the reason that they are very numerous, and that it is impracticable to name them as party plaintiffs herein; and that said defendant, the Bank of is also indebted to a large number of persons other than those who have been made parties hereto, and that this amended complaint is made on behalf of all other creditors of said defendant, the Bank of who may choose to come in and be made parties hereto, or become interested herein.

IV. Plaintiffs further allege, upon information and belief that upon the day of, 19..., said defendant, the Bank of was insolvent, and had been insolvent prior thereto, and has ever since been insolvent, as hereinafter alleged. That on said day of, 19..., said defendant, the Bank of closed its doors, and ceased doing business, and that after said bank so ceased doing business, and on the same day, this action was commenced in the name of L.... M...., a creditor as well as a stockholder of said bank, as plaintiff, against said defendant, the Bank of, under the provisions of sections 3218 and 3219 of the statutes of said state, for the purpose of closing up the business of such bank, and that upon the same day O.... P...., Esq., of the city of was by an order of said court of county, duly appointed receiver of said defendant Bank of, and that upon the same day said O.... P.... duly filed his bond as such receiver, which bond was duly approved by said court, and entered upon the discharge of his duties as such receiver, and has ever since acted, and is now acting, in that capacity. That upon the same day, to-wit, the said day of, 19..., an order was made by said court in said action, enjoining and restraining said defendant, the Bank of, its officers and agents, and each and every of them, from paying any indebtedness due from said defendant, the Bank of to any person, or creditor, or from transferring or delivering to any person, or creditor, of said bank, any of the moneys, property, or effects of said bank, in liquidation or payment of any claims due from said bank to any such person, or creditor, or otherwise, and that said order has since remained and now is in full force and effect.

V. That after the making of said last named order, and on

the day of, 19.., an order was duly made by said court in said action directing the publication of a notice requiring all creditors of said defendant, the Bank of to exhibit their claims and become parties to said action, and that the notice directed in said order was duly published, and that in pursuance thereof these plaintiffs, and other persons similarly situated, duly exhibited their claims, and became parties plaintiff to said action, and that thereafter, and on the day of, 19.., an order was duly made by said court declaring these plaintiffs, and such other persons, parties plaintiff to said action, and making said L.... M...., because of his adverse interest in said action as a stockholder and director of said defendant Bank of, a defendant, instead of plaintiff, herein, and authorizing and permitting these plaintiffs, and all other creditors of said defendant, the Bank of, who may choose to join with them, to amend the original complaint herein, by joining with said defendant Bank of the other defendants above named, and by setting forth the facts herein alleged, and that this amended complaint is made and filed by virtue of the leave so granted.

VI. Plaintiffs further allege, upon information and belief, that at the time the said defendant Bank of ceased doing business as aforesaid, it was possessed of certain assets, the amount of which these plaintiffs are unable to state; but plaintiffs allege, upon information and belief, that the liabilities of said defendant, the Bank of at that time, and for a long time prior thereto, was largely in excess, not only of the amount of such assets, but in addition thereto, of the sum of the amounts unpaid on its capital stock, the statutory liability of its stockholders, and the aggregate dividends paid to them, as herein after alleged.

VII. Plaintiffs further allege, upon information and belief, that at the time said defendant, the Bank of was organized and commenced business, as aforesaid, the capital stock of the said bank was the sum of dollars, divided into shares of the par value of dollars each, and that all of said stock was subscribed for, and issued to, the following named persons, who respectively subscribed for, received, and became the owners of the number of shares of stock set opposite their respective names [*give names of subscribers, and number of shares of stock subscribed for by each*]. That the said several persons to whom said stock was so issued [excepting said X.... Y....] severally paid for said stock so subscribed for and issued to them respectively, ... per cent of the par value thereof, and no more [and that the said X.... Y....

never paid for any portion of the stock so issued to him]. [That on or about the day of, 19.., the said Q.... R.... transferred to the said S.... T.... the shares of stock theretofore owned by the said Q.... R....]

IX. That the stock of said defendant, the Bank of continued unchanged in ownership and amount until on or about the day of, 19.., at which time, at an annual meeting of the stockholders of said defendant Bank of the capital stock of said bank was increased from dollars to dollars, and such increased stock was divided into shares of the par value of dollars each, and that on or about said last named date there were issued to the several persons then holding the original stock in said bank certificates of stock equal in number of shares and amount to the certificates of original stock held by said several persons at said time respectively, and that following such increase in the capital stock of said bank, the ownership of the entire capital stock of said bank was as follows, to-wit [*give names of stockholders and the number of shares held by each*]. That none of the persons to whom were issued said shares of increased stock ever paid for any portion of the same.

X. That on or about the day of, 19.., the said U.... V.... assigned to the said S.... T.... the shares of stock then held by the said U.... V.... [*allege other transfers of stock, if any*]. That the said transfers were entered upon the books of said bank at or about the time thereof. That no other changes occurred in the ownership of said stock, except that upon the death of W.... Z.... above named, which occurred on or about the day of, 19.., the shares then held by him were a part of his estate, and thereafter and on or about the day of, 19.., by proceedings had to administer and divide the estate of the said W.... Z...., deceased, said shares of stock were transferred to the said I.... N...., and the estate of the said W.... Z.... was duly settled, and that the said I.... N.... has ever since remained the owner thereof, and his ownership thereof since said last named date has duly appeared on the books of said bank; and except that [*allege other changes in ownership by descent or devise, if any*]; and except that in or about the year 19.. there was issued by said defendant the Bank of, ... shares of the stock thereof in addition to all of the shares hereinbefore mentioned, to the said defendant S.... T...., and that no part of the said shares so issued were paid for, and that thereafter, but at what date these plaintiffs are unable to state, the said S.... T.... assigned and transferred to the

said defendant C.... N.... Bank shares of said stock of the said defendant Bank of, and that the transfer last mentioned was entered on the books of said Bank of, and that the said C.... N.... Bank has ever since held and owned the shares of stock so transferred to it.

XI. Plaintiffs further allege, upon information and belief, that in pursuance of law, and of the by-laws of said defendant, the Bank of there was duly elected from year to year, a board of directors, to administer the affairs of said bank. That at the annual meeting of the stockholders of said bank, held on or about the day of, 19.., there were duly elected as directors of said bank the said [*naming the elected*], and that said persons were from year to year duly re-elected and continued to act as such directors until the annual meeting of the stockholders of said bank held in, 19.., at which time W.... Z.... was elected a director of said bank in the place of the said Q.... R...., the other members of said board of directors being re-elected, and that each year thereafter, down to and including the year 19.., the same persons were re-elected and acted as directors of said bank. That in the fall of the year 19.. [*allege other changes in the board of directors, if any, whether by death or otherwise*]; and that thereafter all of said board acted as the board of directors of said bank down to the time it closed its doors, and the receiver was appointed therefor, as hereinbefore alleged.

XII. Plaintiffs further allege, upon information and belief, that from the time of the organization of said bank down to the day of, 19.., the said Q.... R...., U.... V...., and X.... Y.... were from year to year elected president, vice-president, and cashier of said bank, respectively, and respectively acted in such capacities. That at the annual meeting of the stockholders of said bank held on said day of, 19.., Q.... R...., X.... Y.... and W.... Z.... were elected president, vice-president, and cashier of said bank, respectively, and continued to act in such capacities, respectively, down to [*allege additional changes in the officers of the bank, whether caused by death, resignation, or otherwise*]; and that thereafter and down to the time when said bank closed its doors, and a receiver thereof was appointed, as hereinbefore alleged, the said Q.... R.... and W.... Z.... continued to act as president and cashier of said bank, respectively.

XIII. The plaintiffs further allege, upon information and belief, that on or about the 1st days of May and November, for and during the years 19.., 19.. and 19.., and on or about the 1st day of November in the years 19.., 19.. and 19.. the board

of directors of said bank, as the same was constituted at said several times, voted, declared and paid a semi-annual dividend of per cent on said thousand dollars of the capital stock of said bank, and that each of the persons who were directors of said bank at the several times when said dividends were declared, voted to declare and pay the same, and that the dividends of 19.., 19.., 19.., 19.., 19.. and 19.. were directed to be declared and paid by the stockholders of said bank, at meetings thereof duly assembled, and that not only such of the stockholders of said bank as were directors thereof at said several times voted to declare and pay said dividends, but that said stockholder defendant A.... X...., and others of said stockholders at said several times whom plaintiffs cannot now state, voted that said dividends, or some of them, be declared and paid. That said several dividends, so declared and voted, were paid to the different stockholders of said defendant Bank of, including said directors thereof, according to their respective shares, and that they were received by them respectively at or about the time at which said dividends were respectively declared [excepting that said dividend of the 1st day of November, 19.., was not paid until on or about January 1, 19..] That at the time when said several dividends were declared and paid, as aforesaid, only per cent of the original dollars of the capital stock of said bank, and no part of the increased dollars of the capital stock thereof, had been paid in, and that said bank was insolvent, and known to be so by said several directors and stockholders who voted to declare and pay said dividends, and that to the knowledge of said directors and stockholders who so voted said dividends, there were no profits earned by said defendant, the Bank of properly applicable to the payment of said dividends, and that, to the knowledge of said several directors and stockholders, the payment thereof impaired and diminished the capital of said defendant Bank of, and that no portion of the net earnings or income of said bank had, prior to the declaring or payment of any of said dividends, been invested in additions to the property of the said bank, and the property thereof had, in no manner been increased in value, and that at the time each of said several dividends were so declared and paid as aforesaid, a large portion of the identical debts which said defendant Bank of owed at the time of the commencement of this action, and which it still owes to its creditors, existed, and was then due and owing from said bank to the same creditors.

XIV. Plaintiffs further allege, upon information and belief, that said defendant, the Bank of had become and was

insolvent as early as the day of, 19.., and so continued to be wholly insolvent until it closed its doors and ceased doing business, on the day of, 19.., as aforesaid, and that such insolvency of said bank was well known to said several persons who had acted as officers and directors thereof since said day of, 19.., as aforesaid. That it was the duty of said several persons who so acted as officers and directors of said bank as aforesaid, at all times they were acting as such, to examine into the affairs and conditions of said bank, and to see that said bank was managed carefully and prudently, and that its funds were not lost, wasted, stolen or squandered, or loaned upon worthless or insufficient security. That said several persons who had so acted as officers and directors of said bank, since said day of, 19.., as hereinbefore set forth, and each of them, have grossly neglected to perform their official duties as such officers and directors. That by section of article of the by-laws of said bank it was provided that the board of directors thereof should require adequate security from the officers and agents thereof for the faithful performance of the trusts and duties reposed in and upon them. That notwithstanding said by-law, and notwithstanding their duty as such officers and directors, said several persons who had so acted as such, failed and neglected to obtain, or take, from any of the persons who had acted as president, vice-president, or cashier, or otherwise as an officer or agent of said bank, any bond, or undertaking, or security of any kind, for the faithful performance by said several officers or agents of said bank of their trusts and duties as such. That said officers and directors have negligently permitted various persons and corporations, who were insolvent and irresponsible, to overdraw their accounts to large amounts, without security, and have negligently permitted the money of said bank to be loaned to irresponsible persons and corporations, without adequate security, whereby said money was lost. That they have negligently and carelessly loaned the money and assets of said bank running for an unreasonable length of time, and at a rate of interest largely below the prevailing rate of interest, and have negligently and carelessly permitted large amounts of such paper to run until the same was long past due, and have negligently and carelessly omitted to take proper steps for the collection or securing of the same, and have allowed such securities to become wholly worthless, and the moneys loaned thereon wholly lost. That they employed a cashier who was dishonest, unfaithful and incompetent, as they had reason to know and did know, and who wasted, embezzled and stole large amounts of the funds of said

bank. That they negligently and carelessly permitted such cashier to pay exorbitant rates of interest upon deposits, and upon certificates of deposit for funds and moneys deposited in said bank. That they negligently permitted such cashier, and other employees of said bank, to make false entries upon the books of said bank, particularly by making it appear on said books, and from such entries, that certificates of deposit issued for and on account of moneys deposited in said bank had been paid, when in truth and in fact they had not been paid, thereby deceiving the bank examiner of the state, and inducing him to make reports of the condition of said bank, which were misleading and deceiving, and thereby inducing the depositing of money in said bank upon the faith of such reports, by many persons, including some of the present creditors of said bank, and that by reason thereof the liabilities of said bank were greatly swelled, to the injury of the present creditors and depositors of said bank. That they negligently and knowingly permitted the president and cashier of said bank to make and transmit on the first Monday of January and July, in each year, to the state treasurer, false and fraudulent reports relative to the condition of said bank, and to file copies thereof in the office of the register of deeds of said county, on the first Monday of January and July, in each year, wherein the assets of said bank were stated to be largely in excess of the real assets thereof, and the debts and liabilities thereof were stated to be largely less than the actual debts and liabilities thereof, at the time when said reports were, from time to time, so made and filed, and that by reason of the making and filing of said false, misleading and fraudulent reports, large sums of money were deposited in said bank, and extensive credit given to said bank by many persons, including some of the present creditors of said bank, upon the faith thereof, and the liabilities of said bank have been thereby greatly swelled, to the injury of all the existing creditors thereof. That in or about the months of and for and during the years 19.. and 19.. reports were made by said bank, in accordance with the provisions of Chapter 291, Laws of 1895, and that said reports purported to truly state the condition of said bank, and the resources and liabilities thereof, and that each of said reports was sworn to by one of the officers of said bank, and that said reports for the year 19.. was attested as correct by said defendants S.... T...., Q.... R.... and U.... V...., and that said report for the year 19.. was attested as correct by said defendants W.... Z.... and S.... T...., and that the same were so sworn to by said officer and attested by said directors, and permitted to be sworn and at-

tested and filed as aforesaid, by the other officers and directors of said bank, notwithstanding the knowledge of such officers and directors of said bank, of the condition thereof as aforesaid, and that such reports were false, misleading and fraudulent, to the knowledge of such officers and directors, and that the resources of said bank were stated therein to be largely in excess of the actual resources thereof, and that the liabilities of said bank were stated therein to be largely less than the actual liabilities thereof, and that by reason of the making and filing thereof large sums of money were deposited in said bank, and extensive credit extended thereto, by many persons, including some of the present creditors of said bank, upon the faith thereof, and the liabilities of said bank thereby largely increased, to the injury of the present depositors and creditors thereof. That shortly after the capital stock of said bank had been increased from dollars to dollars, the then directors of said bank, pretending to claim that said bank had from the time of its organization earned the sum of dollars, and that it then had a surplus of dollars, voted, declared and directed that said sum of dollars be used for the purpose of paying the balance then due from the owners of the original dollars of the stock of said bank upon their subscriptions, and that the balance remaining of said dollars after said application should be applied towards the payment of the additional dollars of capital stock issued during said year 19.., and that again, and in the year 19.., the said directors of said bank, claiming that the said bank, between the years 19.. and 19.. had earned the sum of dollars as profits, or had a surplus amounting to that sum, voted, declared and directed that said sum of dollars should be used and appropriated for the payment of the balance due for said additional dollars of stock, and that said sum of dollars and said sum of dollars were so used and appropriated, although said directors well knew, as the fact was and is, that at said times when said sums were respectively applied to the payment of said stock, said bank had not earned the amount thereof, nor any amount whatever, and had no surplus, and that the application of said sums impaired and reduced the assets of said bank, to the benefit of said directors and other stockholders of said bank who received the same, and to the prejudice of the existing creditors of said bank, some of whom were creditors thereof at the time said different amounts were appropriated and used for the payment of said stock, and that the officers of said bank, since the time when said pretended earnings were so appropriated and used,

though well knowing the facts aforesaid, have negligently and carelessly allowed it to be published and stated that said bank had in fact a surplus, and that the capital stock thereof had been fully paid, and that thereby many persons, among whom were some of the present creditors of said bank, were induced to deposit money therein, and extend credit thereto, to the injury of these plaintiffs and all the present creditors of said bank. And that officers and directors have so carelessly and negligently managed and conducted the affairs of said bank that such part of the capital stock thereof as was in fact paid in has been wholly lost, wasted, squandered, embezzled and stolen, together with over dollars of the deposits in said bank, and that the present assets of said bank will pay but a very small percentage of the present indebtedness of said bank to its depositors and creditors.

WHEREFORE plaintiffs pray that said defendant, the Bank of be adjudged to be severally indebted to these plaintiffs respectively, for the amount of their respective claims, as hereinbefore set forth, together with interest thereon from said day of, 19.. [*date when the bank closed its doors*]; and that each and every of said defendant stockholders be adjudged to be liable to the plaintiffs, and all creditors who are, or may become, parties to this action, for the balance unpaid upon the stock owned and held by said shareholders respectively, and in addition thereto for the amount of stock owned by them respectively at the time of the commencement of this action, and within six months next prior thereto, and for the amount of the dividends paid to said stockholders respectively, with interest thereon from the time of such payment; that said defendant bank, its officers, directors, stockholders and agents, be restrained by the order of this court from exercising any of its corporate franchises, and from receiving any debts or demands due to said defendant bank, and from paying or transferring to any person any of its moneys or credits until the further order of this court; that the receivership of the property, moneys and effects of said bank be continued; that all other creditors of said bank be required to exhibit their claims, and become parties to this action; that a final judgment herein may be rendered according to law, and that thereupon the court cause to be made an equitable distribution of the property of said bank, and of the proceeds thereof, to its creditors; that if such property be insufficient to discharge the debts of said bank, the court, by order and judgment, compel the stockholder defendants to pay in the amount due and unpaid on the shares of stock held by them, or so much thereof as may be necessary; that if the debts

of said bank still remain unsatisfied, that the court ascertain the respective liabilities of said stockholder defendants, and determine the amount payable by each, and enforce such judgment as in other cases; that each stockholder defendant be adjudged to repay each and every dividend received by him, with interest from the time such dividends were paid; that said officers and directors be adjudged to pay all the dividends declared and paid as hereinbefore set forth, to the present creditors of said bank, who are now or may become parties to this action; that said officers and directors be adjudged to pay all the remaining indebtedness of said bank, to the creditors thereof, who are now, or may become parties hereto; and that such other and further relief be granted as may be just and equitable; and that plaintiffs have the costs and disbursements of this action.

1223. Amended complaint in creditor's action against insolvent bank and its officers, to sequester property and enforce statutory and common law liabilities of the stockholders and officers (sustained in *Hurlbut v. Marshall*, 62 Wis. 590).

The above named plaintiff, in his own behalf and in behalf of all other creditors of said defendant Bank, who choose to come in and be made parties hereto, by this, the amended complaint herein, shows to this court:

I. That the said defendant, ... Bank is and for several years last past has been a banking corporation, with banking powers, duly organized, existing and doing business as a bank in the city of, in the state of, under and by virtue of the laws of said state.

II. That said corporation is indebted to this plaintiff in the sum of dollars, being a balance of several sums deposited by this plaintiff in said bank on and between the and days of, 19.., aggregating the sum of dollars. That said deposits were made as aforesaid in the usual course of business. That payment of said balance has been duly demanded of said defendant bank by this plaintiff, and payment thereof refused, and that no part thereof has been paid. That said defendant is also indebted to a large number of persons other than this plaintiff, whose names and the respective amounts due to each are unknown to this plaintiff. That the aggregate amount of said other indebtedness exceeds the sum of dollars, as this plaintiff is informed and believes. That this action is brought in behalf of this plaintiff and in behalf of all other creditors of said defendant

bank who may choose to come in and be made parties hereto or become interested herein.

III. That said defendant has closed its banking office, and has become and is insolvent. That it has a large amount of assets, consisting of cash, choses in action, and other property to an amount unknown to this plaintiff, but less in value in the aggregate than the aggregate amount of its indebtedness. That said choses in action and other property ought to be converted into cash and applied to the payment of its indebtedness.

IV. The plaintiff further alleges that ever since the day of, 19.., the said banking corporation has been wholly insolvent, and that during the whole of said period, while its liabilities have exceeded dollars, the value of its assets have been less than dollars. That during the whole of said period the said defendants [*naming the directors*] were the directors of said corporation, and stockholders owning stock therein to the amount hereinafter stated. That the capital stock of said corporation, as fixed by its articles and certificate of organization, was and is dollars, divided into shares of dollars each. That notwithstanding such insolvency, the said directors, knowing thereof, as plaintiff is informed and believes, on the day of, 19.., and semi-annually thereafter, up to and including the day of, 19.., voted, declared and paid dividends of per cent on said dollars of capital stock, and each of said directors voted for each and every of said dividends, and received the same on their respective shares of capital stock as hereinafter stated, without having any reason to believe there were sufficient net profits properly applicable thereto to pay said dividends. That said votes of said directors declaring said dividends, when said corporation was insolvent as aforesaid, diminished and impaired the capital and the capital stock of said corporation, and that there was never any net profits of said corporation or its business applicable to the payment of said dividends or either of them. That, as plaintiff is informed and believes, neither of said directors ever paid in full for their said shares of said capital stock. That "Schedule A" hereto annexed and made a part hereof, shows the names of the defendant stockholders and the number of shares owned and held by each at the time of the declaration and payment of each of said dividends, and the amount of dividends paid to and received by each of said stockholders on each declaration of dividend as aforesaid.

V. The plaintiff further alleges that on the day of, 19.., the defendant H.... S.... owned shares

of said capital stock, etc. [*give the names of the stockholders and number of shares owned by each*]. That the ownership of said stock at the time of the commencement of this action was and still is the same as on said day of, 19.., except that said L.... N.... in form transferred his said shares to said H.... S.... on or about the day of, 19.. That, as the plaintiff is informed and believes, said transfer last mentioned was not made in good faith but with the intent on the part of said L.... N.... and H.... S.... to release said L.... N.... from liability as a shareholder of said corporation, and with full knowledge on their part of the insolvency of said bank.

VI. The plaintiff further alleges that at the time each of said dividends was declared and paid as aforesaid a large portion of the identical debts which said corporation owed at the time of the commencement of this action and which it still owes to its creditors, existed and was then due and owing from said corporation to the same creditors, and that said portion ever since the day of, 19.., has exceeded the sum of dollars.

VII. That during all the time from the day of, 19.., to the commencement of this action, said H.... S.... was president and said L.... N.... the cashier of said corporation. That, as plaintiff is informed and believes, during said last mentioned period said H.... S.... fraudulently converted more than dollars of the funds of said bank to his own use, and replaced the same with old and worthless bonds and securities, and said president and cashier, knowing said bonds and securities to be worthless, reported the same in their annual reports and statements filed with the register of deeds and state treasurer during all of said period as of their full face value.

VIII. That during all of said period from the day of, 19.., to the commencement of this action the said directors of said banking corporation grossly neglected to perform their official duties as such directors, and negligently permitted the money, property and effects of said bank to be stolen, wasted and squandered. That they negligently permitted various persons and corporations, who were insolvent and irresponsible, to overdraw their accounts to a large amount without security, and negligently permitted the money of said bank to be loaned to irresponsible persons and corporations without adequate security, whereby said money was lost, and negligently permitted the said president to steal and embezzle the funds and securities of said bank and to use them for his own purpose; and that said directors so carelessly and negligently conducted

the affairs of said bank that its entire capital surplus, property and effects, and more than dollars of its funds, with which to pay its creditors, were stolen and lost, whereby it became and is utterly insolvent and unable to pay its creditors more than cents on the dollar of its indebtedness.

WHEREFORE the plaintiff prays that said banking corporation be adjudged to be indebted to the plaintiff in the sum of dollars; that each and every of said defendant stockholders be adjudged to be liable to the plaintiff, and all creditors who shall become parties hereto, on account of their indebtedness to the amount of stock owned by them respectively at the time of the commencement of this action and within six months next prior thereto; that said corporation, its officers, agents, stockholders and directors be restrained by the order of this court from exercising any of its corporate franchises and from receiving any debts or demands due said bank, and from paying or transferring to any person any of its moneys or effects until the further order of this court. That a receiver may be appointed to take possession of all the moneys, property and assets of said defendant bank, with the usual and full powers of a receiver in such cases; that this court fix a time within which all the other creditors of said bank shall be required to exhibit their claims and become parties hereto; that a final judgment herein may be rendered, according to law, and that thereupon the court cause to be made an equitable distribution of the property of said bank and of the proceeds thereof to its creditors; that if such property be insufficient to discharge the debts of said bank the court, by order and judgment, compel each stockholder defendant to pay in the amount due and unpaid on the shares of stock held by him, or so much thereof as may be necessary; and, if the debts of said bank shall then remain unsatisfied, that the court ascertain the respective liabilities of said stockholder defendants, and determine the amount payable by each, and enforce such judgment, as in other cases; that each stockholder defendant be adjudged to repay each and every dividend received by him since and including the day of, 19.., with interest from the time said dividends were paid; that said directors be adjudged to pay all the dividends declared and paid, as hereinbefore set forth, to the present creditors of said bank who shall become parties hereto, and whose debts existed at the time each and every or any of said dividends were declared and paid; that said directors be adjudged to pay all the debts of said bank now existing which also existed at the time each and every or any of said dividends were declared and paid; and said directors be adjudged to pay

all the indebtedness of said bank owing to the creditors thereof who shall become parties hereto; and that such other relief be granted, as may be just and equitable, together with the costs and disbursements of this action.

1224. Complaint by creditor of insolvent business corporation to enforce liability of stockholders for wages due employees under Wis. stats. 1898 sec. 1769 (adapted from complaint in *Sleeper v. Goodwin*, 67 Wis. 577).

The plaintiff, who brings this action on behalf of himself and all other judgment creditors of the C.... D.... company whose executions have been returned unsatisfied and whose judgments have been rendered for demands due from said corporation to clerks, servants and laborers for services rendered within the period of six months, respectively, and who wish to come in and become parties to this action, complains of the defendants, and alleges:

I. That the defendant, the C.... D.... company, was incorporated under the laws of the state of on the day of, 19.., with a capital stock of dollars, for the purpose of manufacturing wagons, farming tools, etc., and that on or about the day of, 19.., the capital stock of said corporation was duly increased to dollars. That immediately upon its incorporation, as aforesaid, the defendant corporation proceeded to carry out the purpose of its organization until, on or about the day of, 19.., when it became insolvent and suspended business, and that it was not and never has been a railroad corporation.

II. That on or about the day of, 19.., said company hired the plaintiff to perform services in its shop in the business of making wagons; that the plaintiff continued to work for the company as a laborer or servant from that time until the day of, 19.., at which time the company was indebted to plaintiff for labor and services performed by him in the sum of dollars, and that no part of the same has ever been paid; that said sum was wholly due and earned within a period of six months immediately preceding said day of, 19..; that on the day of, 19.., plaintiff commenced an action against said corporation upon the aforesaid demand and on the day of, 19.., at a special term of the court for the county of obtained a judgment of dollars on account of said claim and interest thereon, with dollars, costs of suit; that an execution was duly issued out of said court upon said judgment, and placed in the hands of the sheriff of

..... county, who on, 19.., returned the same wholly unsatisfied.

III. That on the day of, 19.., the C.... D.... company had become greatly embarrassed financially, and indebted to the amount of about dollars; and on the day of, 19.., duly assigned to L.... M...., of, state of, all and singular its real and personal property, chattels, choses in action, books and papers in trust that he should take possession of such property, and sell and dispose of the same, and convert the same into money, and collect, recover and get in all due bills, securities, notes and accounts of said company, and out of the proceeds to pay the reasonable expenses of his trust with a reasonable compensation to himself, and out of the residue, if sufficient to pay the debts in full; if not sufficient, to pay them ratably, without preferences; that said assignee duly gave his bond to faithfully execute the duties of his trust, which bond with a true copy of the assignment was filed in the office of the clerk of court for county, on the day of, 19..; that said assignee duly endorsed on said copy of assignment, his consent to take upon himself the duties of his trust, and a certificate that the same was a true copy of the original; that within ten days thereafter said assignee filed in the office of said clerk a correct inventory of the assets of the corporation, and a list of its creditors, with amount due to each, verified and certified as required by law; that said assignee took possession of said property on the day of, 19.., and still is such assignee, still engaged in performing the duties of his said trust; that he has collected all the demands and accounts due to said company, or has converted or disposed of the same, and that said company has no property or effects of any kind other than those which the said assignee has already collected or disposed of, or is now engaged in collecting; that the time of making assignee's final report has been extended from time to time by the court for county; and that said assignee has not filed the same as yet.

IV. That by the articles of association the capital stock of said corporation was dollars, divided into shares of dollars each; that at the time of incurring the company's debt to the plaintiff, and down to the present time, and at the time of the rendition of the judgment above set forth, and at the date of the commencement of this action I.... D...., of, state of, was a stockholder in said corporation, holding shares of stock therein, to the amount of dollars.

WHEREFORE plaintiff prays judgment for the discovery of all persons who may be stockholders, that when so discovered they may be made parties to this action; that the stockholders be adjudged to pay into court an amount equal to their capital stock respectively, or so much as may be necessary to discharge the sum of dollars, with interest thereon from the day of, 19.., together with the sum of dollars, costs of said execution and return, and that the plaintiff may have such other or further relief in the premises as shall be just, together with costs.

1225. Complaint by creditor against insolvent bank and stockholders to enforce additional liability of stockholders under the banking law (adapted from complaint in Booth v. Dear, 96 Wis. 516).

The plaintiff, for himself and on behalf of all other persons who are creditors of the said defendant C.... N.... Bank who may in due time come in and seek relief by and who shall contribute to the expenses of this action, for an amended complaint complains of the said defendants and alleges:

I. That the said defendant, C.... N.... Bank, is now and was at all times herein mentioned, a banking corporation created and existing by virtue of and under the laws of the state of Wisconsin, organized pursuant to an act entitled, "An Act to Authorize the Business of Banking," approved, 19.., being Chapter of the Laws of 19.., and acts amendatory and supplemental thereto.

II. That the amount of its capital stock is dollars. That the said capital stock is divided into shares, each share being of the face or par value of dollars. That its place of business is the city of, in the county of, in the state of, and that prior to the day of, 19.., it was actively engaged in, and was carrying on a banking business in the said city of, but that on the said day of, 19.., it duly made a voluntary assignment of all its property, credits, and effects of every description, to one Trust Company, pursuant to Chapter of the statutes of the state of, and acts amendatory and supplemental thereto. That the said Trust Company immediately qualified as such assignee, accepted the trust imposed thereby and entered on the execution thereof. That at the time the said assignment was made the C.... N.... bank was indebted to the state of in the sum of dollars, that it was indebted to the city of in the sum of dollars, and that it was indebted

to divers other creditors in various sums, amounting in all to a total indebtedness of dollars. That the entire assets of the said bank assigned as aforesaid did not then and do not now exceed in value dollars. That at all times since the date of the said voluntary assignment the banking office of the said C.... N.... Bank has been closed and it has done no business. That it has no property, credits, or effects of any description subject to execution, or which can be reached by action at law, or which can be sequestered in an action in equity, and that it is wholly insolvent.

III. That all the said defendants, other than the said C.... N.... Bank, are now and were within the six months next preceding the date of the commencement of this action, and while the indebtedness hereinafter described existed, stockholders in the said corporation, and that each of them now holds or has held within the said six months the number of shares of stock therein, and of the par value set opposite his name, to-wit [*give names of stockholders, number of shares held by each, and par value.*] That the persons herein named as stockholders are all the persons that this plaintiff has been able to discover who hold stock in said corporation, or who are liable as stockholders therein, and this plaintiff alleges, on information and belief, that they are all the persons who own stock, or who are liable as stockholders therein.

IV. That on the day of, 19.., at and before the time the said C.... N.... Bank made the said assignment and ceased to do business, as aforesaid, this plaintiff had on deposit with the said C.... N.... Bank, which had been deposited by this plaintiff in the usual course of business, and which was subject to check, the sum of dollars and cents, for which sum the said C.... N.... Bank was then and is now indebted to this plaintiff.

V. That this plaintiff has duly filed with the clerk of the court in and for said county an affidavit setting forth the nature, consideration and amount of his said debt on account of his said deposit with said bank, over and above all setoffs, and in accordance with section No of Statutes of the state of, and that no dividend has been paid thereon.

VI. That on the day of, 19.., one O.... P...., Esq., a justice of the peace in and for said county of, and state of, while sitting as such justice of the peace, duly rendered a judgment in favor of one W.... X.... and against the said C.... N.... Bank, for the sum of dollars and cents, exclusive of costs, and for dollars and cents costs, in all for the sum

of dollars and cents. That said judgment was rendered upon an indebtedness contracted by the said C.... N.... Bank on the day of, 19... That on the day of, 19..., a transcript of the said judgment was duly filed in the office of the clerk of the court in and for the said county, and that the said judgment was duly docketed in the said office against the said defendant on the said day of, 19... That an execution against the property of the said C.... N.... Bank was, on the day of, 19..., duly issued from the said court upon the said judgment, and on the day of, 19..., delivered to the sheriff of said county, and that on the day of, 19..., the said sheriff duly returned the said execution wholly unsatisfied for want of property to apply thereon. That on the day of, 19..., the said W.... X.... duly assigned to this plaintiff this said judgment, and all his rights thereunder, and that this plaintiff is now the lawful owner thereof. That there is now due and owing to this plaintiff from the said C.... N.... Bank upon said judgment the sum of dollars and cents, together with the sum of dollars subsequent costs thereon, in all the sum of dollars and cents; and that there is now due and owing to this plaintiff from the said C.... N.... Bank on account of the said deposit and the said judgment the total sum of dollars and cents, over and above all setoffs and counter-claims.

VII. That this plaintiff is informed and verily believes, and alleges the fact to be, that some of the said defendant stockholders have within the six months last past transferred a portion of their stock to irresponsible persons for the sole purpose of avoiding their individual statutory liability to creditors, and that this plaintiff verily believes that unless their stockholders' liability is fixed, others will transfer their stock to irresponsible persons for the same purpose, and that loss to creditors will result therefrom.

WHEREFORE this plaintiff prays judgment: (1) That all other persons who are creditors of the said C.... N.... Bank, and who in due time manifest a desire to come in hereunder, and who contribute to the expense of this action, be made parties plaintiff herein, and that they be allowed to prove their claim herein and to participate in the proceeds of this action. (2) That all other persons, if any there be, be discovered who own stock in said corporation, or who have owned stock therein within the six months last past, or who have transferred their stock for the purpose of escaping their individual statutory

liability to creditors of the said corporation, or who for any other reason are liable as stockholders to said creditors, and that when so discovered, they be made parties defendant herein.

(3) That judgment be entered against the said defendant, C. . . . N. . . . Bank, for the amount of this plaintiff's said deposit, with interest thereon, and for the amount of all other creditor's claims, with interest thereon, who may come in hereunder.

(4) That the stockholders in said corporation, and all persons who are liable as stockholders to its creditors, together with the par value of stock owned by each, be adjudged, and that they be adjudged and decreed liable for the amount of this plaintiff's said claims and all other creditors' claims who may come in hereunder and who shall set out and prove their claims in this action, to a sum equal to the par value of stock held by them, or upon which they are liable, respectively, and that they and each of them be ordered to pay the same, or so much thereof as may be necessary to satisfy the said claims of creditors, together with the costs and disbursements of this suit, into court, for persons entitled thereto. Or that judgment be entered against the said stockholders for the amount of the claims of this plaintiff, and such other creditor's claims as may come in hereunder, not exceeding the amount of stock held by them, the said stockholders, and for interest and costs. (5) And for such other and further order, judgment or relief as to the court shall seem just and equitable. And this plaintiff will ever pray.

CHAPTER LXXVI.

COMPLAINTS IN ACTIONS AGAINST PROMOTERS OF CORPORATIONS

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| 1226. Complaint in action at law by corporation against promoters, to recover secret profits on real estate sold to the corporation. | real estate sold to the corporation. |
| 1227. The same, in equity, to rescind sale and recover the entire purchase price. | 1229. Complaint in equitable action by stockholders on behalf of corporation against fraudulent promoters, where corporate officers refuse to sue. |
| 1228. Complaint in action at law by corporation against promoters and third persons conspiring with them, to recover secret profits on | 1230. Complaint in action at law by stockholder to recover his individual damages resulting from the fraud of promoters. |

Persons who purchase property or obtain an option thereon for the purpose of transferring it to a corporation to be formed, and who afterwards form such corporation and induce others to join therein and purchase stock therein, stand in a fiduciary relation to such corporation and its stockholders, and it is their duty to fully disclose their relationship to the property to their associates; and if they do not do so, but make a secret profit on the property by transferring it to the corporation at a price larger than they pay, the corporation may repudiate and rescind the contract and recover the whole purchase money, or may keep the property and recover the amount of the secret profits so made. *Pittsburg Mining Co. v. Spooner, et al.*, 74 Wis. 307 s.c. 42 N. W. 259; *Fountain Sp. Co. v. Roberts*, 92 Wis. 349 s.c. 66 N. W. 399. The action may be brought by the corporation, or in case the governing body refuse to bring it, by the defrauded stockholders in equity, in behalf of the corporation.

The stockholders who are thus defrauded may also, in the absence of an action by the corporation, each sue at law and recover of the promoters his individual damages for the fraud, to the extent of the enhanced price he paid by reason thereof. *Franey v. Warner*, 96 Wis. 222 s.c. 71 N. W. 81.

1226. Complaint in action at law by corporation against promoters, to recover secret profits on real estate sold to the corporation (sustained in Pittsburg Mining Co. v. Spooner, 74 Wis. 307 s.c. 42 N. W. 259).

The above named plaintiff, which was on the day of, 19.., organized as a corporation under the laws of the state of and is doing business as such, complains of the above named defendants, and shows to this court:

I. That on or about the month of, 19.., the defendants conceived the idea, and conspired and agreed together to promote the organization of the plaintiff corporation for the ostensible purpose of carrying on the business of mining iron ore on the Gogebic Range, so-called, in the state of, but for the real purpose of deceiving and cheating those who might deal with said company, and by such deceit enriching themselves at the expense of the company.

II. That in pursuance of their scheme the defendants obtained for the purpose of purchase by said company, temporary control of a mining option on said Gogebic Range, said option conferring the right on certain terms and conditions to prospect, explore and mine for iron ore on the half of the quarter of section, township, range, in county in the state of Said option was owned by E.... & F.... of in the state of, and the price demanded by them for it was dollars and no more. And at that price the defendants acquired the right to buy it for a certain limited time. Having thus secured the temporary control of said option, for the purposes of said company, the defendants proceeded to obtain subscriptions to the capital stock of the proposed corporation to buy it.

III. That in order to induce subscriptions to said capital stock, the defendants among other things falsely and fraudulently stated and represented to divers persons, and to all persons who became and now are stockholders in said company, that the price demanded by E.... & F.... for said option was dollars; that it could not be bought for any less; that the defendants were themselves desirous of buying it, but were unable pecuniarily to pay so much money, but desired to organize a corporation to purchase it, in which they would themselves take stock to the extent of their ability and pay the same price for it that every one else would have to; that all stockholders would be in on the "ground floor"; that there was no speculation in the purchase price; that they, said defendants, were making nothing out of it, and desired to

make nothing, not even their expenses, unless the company saw fit to reimburse them, except what all stockholders would make alike through the operation of the proposed company in mining the ores covered by said option; that it would be necessary for the company to raise dollars in money, of which dollars must be paid to E.... & F.... for the option, and dollars should be held in the company's treasury for the purpose of development. In furtherance of said fraudulent scheme and conspiracy, the defendants drew up, and by said fraudulent representations procured to be signed a subscription paper of which the following is a copy [*insert copy of subscription paper*] that said paper was so signed by a large number of persons, agreeing to take shares in sufficient amount in the aggregate to cover the entire proposed stock of the projected corporation, to-wit: dollars.

IV. That immediately after said stock had thus all been subscribed, and in pursuance thereof, on the day of, 19.., the defendants organized a corporation in all respects conformably to the laws of the state of, under the name or the A.... B.... Company, said corporation being the plaintiff herein. The defendants were the sole incorporators of said company, and as such held the first meeting of the company on the day of March, 19.., at aforesaid, and all of them were present. The defendant, C.... D...., was at that meeting elected president of the company, and the defendant, J.... K...., treasurer, and as such they have continued to act during all the time covered by the facts herein alleged. At or about the time of said meeting, in further pursuance of said fraudulent scheme, the defendant J.... K.... by the advice and procurement of the defendants C.... D.... and E.... F...., but in the joint interest of all of them, subscribed for the entire stock of said corporation, to-wit, ... dollars, except one share each of dollars, which were taken by the defendants C.... D.... and E.... F.... Thereupon the company, at the same meeting, by the unanimous vote of defendants, as sole corporators and directors, adopted a resolution of which the following is a copy:

"RESOLVED that in accordance with the subscription of J.... K.... to the capital stock of said company, the president and secretary hereof issue to him, or to such person or persons as he may direct, and in such number of shares as he may direct, all of the said stock except two shares thereof, one of which is held by said C.... D.... and the other by said E.... F...., the said stock to the said J.... K.... to be issued as paid up in full in consideration of his making and delivering

to the president of the said corporation, for the said corporation, an assignment in writing, duly executed, of an option which he now owns on the half of the quarter of section, township, range, in county, state of"

And plaintiff further says that none of said capital stock except dollars thereof now held by the defendant J.... K.... was ever issued to him. That although he conveyed to the company the mining option hereinbefore mentioned, in nominal payment for all the stock so subscribed for by him, neither the defendant J.... K...., nor any of the defendants ever had, or held any valuable interests in said option above the price of dollars, which had to be paid to E.... & F.... for the same; that said option having been procured and being held by the defendants or by the defendant J.... K.... for them, as promoters and trustees of said corporation, whatever value or interest they possessed or could possess therein inured to and was the property of said corporation when formed, without advance in price or other condition whatever, and the plaintiff avers that at that time dollars was the full value of said option.

V. The plaintiff further represents that the said defendants, in further pursuance of said fraudulent scheme, and in order if possible to cover up and conceal the true nature of their transaction [but which it in fact discloses rather than conceals], after said subscriptions were obtained, caused said option to be conveyed to said defendant J.... K.... without [a dollar of] consideration; then caused the company to buy it of him for substantially its entire capital stock, caused the agreement to take shares in the projected company, as hereinbefore set forth, to read as an agreement to take them of said J.... K.... and pay him for them instead of the company, and then issued the shares so fraudulently subscribed to the several persons who by the agreement aforesaid had agreed to take them, and collected from them the sum of dollars, paid E.... & F.... the sum of dollars for the option, kept dollars in the treasury of the company, and fraudulently captured and converted the remaining dollars to their own use, in violation of their duties to the company, as its promoters, trustees and directors, whereby your orator has been greatly damnified and sustained a loss of dollars, and upwards.

VI. The plaintiff further says that in procuring control of the mining option aforesaid, organizing the plaintiff corporation, securing subscriptions for its capital stock, collecting moneys thereon, paying for said option to E.... & F...., having it

conveyed by them to the defendant J.... K...., and by him to the plaintiff, and in all other matters touching the organization of the plaintiff corporation and the purchase of said option, the defendants became and were promoters, agents and trustees of the plaintiff, a fiduciary relation of especial trust and confidence, whereby, and while so acting, they could not in law, by whatsoever specious pretext, pretense or contrivance, gain any personal profit or advantage over the plaintiff or make any valid contract with it, to its prejudice, and to their individual advantage.

VII. And the plaintiff further says that the amount paid to said E.... & F.... by the defendants, on behalf of the plaintiff was the sum of dollars; that the amount obtained by the defendants from the company on the fraudulent pretext of said payment was dollars, ... dollars of which the defendants have diverted from the company and fraudulently appropriated to their own use. For this amount they are justly indebted to the plaintiff as for so much money had and received to its use.

WHEREFORE the plaintiff demands judgment for said sum of dollars, with interest and costs.

1227. The same, in equity, to rescind sale and recover the entire purchase price.

[Follow substantially the allegations in the last preceding form, and add following allegation]:

IX. That the plaintiff was first informed of the truth in regard to the said sale of said land to said corporation, and that said defendants had so fraudulently procured to themselves an illicit and secret profit in said lands, as aforesaid, on or about the day of, 19.., and that since said date the plaintiff has in no manner ratified or affirmed the said sale, but on the contrary thereof, on or about the day of, 19.., this plaintiff caused to be executed a quit-claim deed of said lands, running to the said defendants as grantees, and tendered the same to the defendants, and demanded of the defendants the return of the said consideration money so paid by the plaintiff, but the defendants refused and still refuse to accept said deed, or return said consideration.

WHEREFORE plaintiff demands judgment that the said sale and conveyance of said land to the plaintiff by said defendants be adjudged null and void, and that the same be rescinded; that the said defendants be adjudged and required to accept said quit-claim deed, and that the plaintiff recover of the defendants the said sum of dollars, the consideration money paid

for said land, with interest from the day of, 19..., and for such other and further relief as may be just and equitable, with costs.

1228. Complaint in action at law by corporation against promoters and third persons conspiring with them, to recover secret profits on real estate sold to the corporation (sustained in *Fountain S. P. Co. v. Roberts*, 92 Wis. 349 s.c. 66 N. W. 399).

I. That at all the times hereinafter mentioned the plaintiff was and still is a corporation duly organized and existing under and by virtue of the laws of the state of

II. That, as plaintiff is informed and believes, for six months immediately preceding the day of, 19..., said defendants D.... M.... and D.... D.... were co-partners in business under the name and style of M.... D.... Company, engaged in the business of buying and selling real estate in the city and county of, state of

III. That, as plaintiff is informed and believes, during the months of and, 19..., said defendants W.... D.... and H.... M.... conceived the idea and agreed together to promote the organization of the plaintiff corporation for the ostensible purpose of purchasing a certain tract of land and reselling the same at a profit, but in reality for the purpose of defrauding such persons as might become members of such corporation, or might deal with such corporation, and of defrauding such corporation, in the purchase of said land, and by so doing enriching themselves, as hereinafter fully set forth.

IV. That the said tract of land was known as the tract, and was described as follows [*give description*].

V. That at said time one W.... Z...., of, state of, controlled said premises, by reason of owning a land contract, or option upon the same, according to the terms of which W.... & U.... of, state of, who were then the legal owners of said premises, agreed to convey said premises at a price of dollars; that of said purchase price dollars was represented by a mortgage which was then an incumbrance upon said premises; that said W.... Z.... had paid dollars of said purchase price, and, as plaintiff is informed and believes, it was provided by the terms of said option or contract that said W.... & U.... would execute and deliver a warranty deed of said premises to said W.... Z.... or his assigns upon payment of dollars, and accrued interest on said mortgage, and the execution of an additional mortgage of dollars upon said premises;

that the total cash payment necessary to be made under said contract or option to obtain a warranty deed of said premises was dollars, and said interest.

VI. That, as plaintiff is informed and believes, said defendants D.... M.... and D.... D.... as such co-partners, knowing of the fraudulent purpose and intention of said defendants W.... D.... and H.... M...., as above set forth, and in aid of said fraudulent purpose and intention, undertook and agreed with said W.... D.... and H.... M.... during the month of, 19.., to procure from said W.... Z.... said contract or option, and to use and transfer the same as said W.... D.... and H.... M.... might desire and direct, in carrying out said fraudulent scheme, in consideration of receiving a share of the illegal profits to be made out of the subscribers to the stock of said corporation, or out of said corporation.

VII. That, as plaintiff is informed and verily believes, said defendants W.... D.... and H.... M.... thereupon prepared an agreement in writing, which provided in effect that the signer thereof agreed to pay the sums set opposite their respective names toward the purchase price of said premises hereinbefore described, at a price of dollars.

VIII. That, as said plaintiff is informed and believes, said defendants W.... D.... and H.... M.... thereupon proceeded to procure subscribers to the stock of said proposed corporation, the plaintiff herein, and to procure signatures to said agreement, and in order to induce subscriptions to said stock, and to induce signatures to said agreement, represented to many and divers persons, and to all persons who became and who now are stockholders in said corporation, the plaintiff herein, that it was proposed to form a corporation or association for the purpose of purchasing said premises, and falsely represented to said persons that said premises were cheap at the price of dollars; that the defendants W.... D.... and H.... M.... were themselves desirous of becoming stockholders in said corporation to buy said premises for said sum of dollars, and that said defendants W.... D.... and H.... M.... would subscribe to said stock, and falsely represented that the price asked by the owners of said premises for the same was dollars, of which dollars would have to be paid in cash at the time of purchasing the same, and the balance, to-wit, ... dollars, could be secured by mortgage upon said premises; and falsely represented that said premises could not be bought for any less sum, and falsely represented that said W.... D.... and H.... M.... would make nothing out of said sale except as members of said corporation, and represented

that they desired to secure enough signers of said agreement and enough subscribers to the stock of the proposed corporation, besides themselves, to make up the sum of dollars necessary for the cash payment upon said premises.

IX. That said defendants W.... D.... and H.... M.... concealed from all persons to whom such representations were made, and from all who signed said agreement, and from all who became stockholders of plaintiff's corporation, that said premises could be bought for a less sum than dollars, and concealed from all such persons that said defendants W.... D.... and H.... M...., or any of said defendants, would make, or intended to make, any profit whatever out of said transaction for themselves, except such profits as W.... D.... and H.... M.... might make as stockholders of said corporation.

X. That said defendants W.... D.... and H.... M...., thereupon circulated said subscription list or agreement, and by means of said false and fraudulent representations procured the signatures of many persons thereto for various amounts, all of whom agreed to take stock in said corporation, all of whom were induced to sign the same and induced to agree to take stock in said corporation to buy said premises, by said false and fraudulent representations so made to them by said defendants W.... D.... and H.... M....; that all of said persons are now stockholders of this plaintiff.

XI. That, as plaintiff is informed and believes, all the persons who became and all persons who now are stockholders and who agreed to take stock in said plaintiff corporation, and all persons who signed said agreement, with the exception of said defendants W.... D.... and H.... M.... were induced to become stockholders and to agree to take stock in the plaintiff corporation and to sign said agreement by means of said false and fraudulent representations so made by said defendants W.... D.... and H.... M.... and became said stockholders and signed said agreement in the belief that no profit would be made out of said premises, except such as might be made by all of said stockholders alike.

XII. That said defendant W.... D.... subscribed for stock in said plaintiff corporation to the amount of dollars; that said defendant H.... M.... subscribed for stock in said corporation to the amount of dollars.

XIII. That a sufficient number of persons signed said subscription list of agreement to make the total amount subscribed and agreed to be paid for the capital stock of said corporation, and for the purpose of purchasing said land amounting to

..... dollars, inclusive of the amounts subscribed by said defendants W.... D.... and H.... M....

XIV. That immediately after such subscription and such signatures had been secured, and during the month of, 19.., said defendants W.... D.... and H.... M.... represented to said subscribers or signers that it was necessary that the amounts respectively subscribed toward the purchase price of said premises or to said capital stock, be paid in at once to said defendants W.... D.... and H.... M.... in order to enable them to purchase said premises at said price, to-wit, ... dollars for the said corporation and for said stockholders; that relying upon and induced by such representations all of said subscribers paid said defendants W.... D.... and H.... M.... the whole amount of their respective subscriptions, amounting in the aggregate to the sum of dollars, a large part thereof being paid in before the day of, 19.., and the whole thereof being paid into said W.... D.... and H.... M.... before the day of, 19..

XV. That, as plaintiff is informed and believes, at or about the time said defendants W.... D.... and H.... M.... were circulating said subscription list or agreement, and obtaining such subscribers and collecting said moneys, the said defendant D.... D...., acting on behalf of the firm of M.... D.... Company, and pursuant to said agreement set forth in paragraph VI hereof, and with the knowledge and consent of said D.... M...., went to, state of, and purchased said contract upon said premises from said W.... Z.... for the sum of dollars, and had said contract or option assigned to him by assignment on the back thereof signed by said W.... Z...., and returned to, state of, at or about the time said defendants W.... D.... and H.... M.... had procured said subscribers and had collected said moneys from said subscribers.

XVI. That, as plaintiff is informed and verily believes, said D.... D...., acting on behalf of said M.... D.... Company, shortly after he had returned to the city of, to-wit, on or about the day of, 19.., received from said W.... D.... and H.... M.... the sum of dollars of the moneys collected from said subscribers in a certificate of deposit on the Bank of, and in pursuance of said agreement set forth in paragraph VI hereof, delivered and paid said certificate of deposit to said W.... & U.... as a partial payment under said contract or option. That, as plaintiff is informed and believes, at said time, or between said time and the day of, 19.., said

defendant D.... D...., acting on behalf of said M.... D.... Company, assigned and transferred said contract or option by assignment thereof written on the back of said contract or option, and signed by said D.... D...., to said W.... & U...., and directed said W.... & U.... to execute and deliver the warranty deed of said premises to such person as said W.... D.... and H.... M.... might direct upon payment of the balance due under said contract or option. That, as the plaintiff is informed and believes, said W.... D.... and H.... M.... paid to said W.... & U.... in presence of said D.... D.... on or about the day of, 19.., the balance of the cash payment remaining due under said contract or option, to-wit, the sum of dollars; that said sum of dollars was the balance of the cash payment to be made under said contract or option, as set forth in paragraph V hereof.

XVII. That at the time said money was so paid to W.... & U...., as above stated, one J.... E.... was a signer of said agreement and had agreed to take stock of said proposed corporation to the amount of dollars; that the said defendants W.... D.... and H.... M.... requested said J.... E.... to become the grantee in the deed of said premises from W.... & U...., the owners thereof, and to hold the title to the same to the benefit of said corporation, plaintiff herein, until the organization thereof could be perfected, and they represented to said J.... E.... that it was necessary to have some person to hold the title to said premises until said organization could be effected; that said J.... E.... consented to act as grantee in such deed for the benefit of said corporation, the said plaintiff herein, and said premises were thereupon conveyed to him by said W.... & U.... at the request of said W.... D.... and H.... M.... by a warranty deed, on or about the day of, 19..; that the consideration named in said deed was one dollar; that said J.... E.... never had any interest in said premises and never claimed any interest whatever in the same, except as trustee for said corporation, and for the signers of said subscription list or agreement; that at said time said J.... E.... duly executed and delivered to said W.... & U.... his promissory note for dollars, and duly executed and delivered to said W.... & U.... a mortgage upon said premises to secure said sum; that said note and mortgage were given to secure the payment of the balance of the purchase price of said premises, according to the terms of said contract or option mentioned in paragraph V hereof.

XVIII. That, as plaintiff is informed and believes, the total

amount of the payments made for said lands to said W.... & U.... was the sum of dollars, and the total amount paid to said W.... Z.... for his interest in said contract or option was dollars, making the total amount paid by all of said defendants for said premises dollars.

XIX. That, as plaintiff is informed and believes, at or about the time said last payment was made to said W.... & U...., to-wit, on or about the day of, 19.., said defendants W.... D.... and H.... M.... paid and turned over to said D.... D.... and D.... M.... dollars out of the moneys collected from said subscribers as above set forth, as the share of said D.... M.... and D.... D.... of the illegal profits of said transaction, and pursuant to the agreement mentioned in paragraph VI hereof.

XX. That thereupon and in said month of, 19.., said defendants W.... D.... and H.... M.... proceeded to perfect the organization of said corporation, the plaintiff herein, and had the articles of incorporation thereof drawn up by their attorney; that said articles were signed by said W.... D.... and by two of said subscribers at the request of said W.... D.... and H.... M.... and were duly caused to be recorded as required by law, in the office of the register of deeds of county, on the day of, 19.., and filed with the secretary of state of the state of on the day of, 19...

XXI. That on or about the day of, 19.., said signers of the articles of incorporation met at the office of said W.... D.... in the city of for the purpose of perfecting the organization of said plaintiff, at which time a large part of the subscribers to the stock of said plaintiff, or the signers of said agreement were also present; that the minutes of said meeting had been prepared beforehand by said attorney of said W.... D.... and H.... M.... and the method of procedure at said meeting was directed by said W.... D.... and H.... M....; that a contract of subscription, of which the following is a copy, was written in the minutes of said meeting, so prepared beforehand, by said attorney, to-wit [*copy the subscription agreement*].

XXII. That said list was thereupon signed by such of the persons as were present of those who had subscribed to the first subscription list or agreement in the same amount as they had subscribed to said first subscription list or agreement, and amounted in the aggregate to dollars; that the balance of said dollars subscribed in said first list of agreement was subscribed at said time on said second subscription list by

said J.... E...., acting at the request of said W.... D.... and H.... M.... for and in behalf of such of the subscribers to the said first list or agreement as were absent from said meeting; that said defendants W.... D.... and H.... M.... and said J.... E.... were thereupon elected as directors of said corporation, the plaintiff herein, and constituted the board of directors of said corporation; that a resolution was then passed, at the request of said defendants W.... D.... and H.... M...., authorizing and empowering said board of directors to purchase the premises hereinbefore described at the price of not to exceed dollars; that said subscribers to stock were not aware that said premises had already been purchased for a cash payment of dollars, as above set forth, but verily believed that the price of the same was dollars, of which dollars would have to be paid at once in cash.

XXIII. That said stockholders' meeting was then adjourned and a meeting of the board of directors, elected as aforesaid, and consisting of said W.... D.... and H.... M.... and J.... E.... was immediately held; that said W.... D.... was elected president, said J.... E.... vice-president, and said H.... M.... secretary and treasurer, at said directors' meeting.

XXIV. That thereupon and at the request of said W.... D...., acting as the president of the plaintiff, and of said H.... M...., acting as the secretary of plaintiff, said J.... E.... made and executed to plaintiff, and delivered to said W.... D.... and H.... M...., acting as such officers of said plaintiff, a warranty deed of the said premises, wherein and whereby said J.... E.... conveyed said premises to said plaintiff, subject to said mortgage of dollars and to said mortgage of dollars; that the consideration recited in said deed was one dollar and other valuable consideration; that said J.... E.... received no consideration whatever for said premises, or for executing said deed; that he did not know what said defendants had paid for said premises; that said W.... D.... and H.... M.... had represented to him, and he verily believed that the purchase price demanded by said W.... & U.... for the same was dollars, and that the said W.... D.... and H.... M.... had paid dollars in cash for the same, leaving the balance of dollars secured by mortgages, as above stated; that said J.... E.... had taken said conveyance merely as trustee for said corporation and for the accommodation of said plaintiff, and transferred said premises to plaintiff entirely without compensation to himself.

XXV. That said defendant W.... D...., acting as the secretary and treasurer of plaintiff, caused it to appear by the ledger and cash book of plaintiff, that dollars in cash had been paid into the treasury of plaintiff from said subscribers to the capital stock of plaintiff, and acting as such secretary and treasurer, made false and fraudulent entries upon said cash book and ledger, and made it appear by such cash book and ledger that dollars in cash had been paid by plaintiff for said premises, and that said premises had been purchased by said board of directors for plaintiff at the price of dollars of which dollars had been paid in cash, and the balance of which was represented by mortgages; that said false and fraudulent entries were so made by said W.... D.... for the purpose of deceiving the plaintiff and the stockholders of plaintiff, and of concealing from them that said defendants had paid only the sum of dollars in cash for said premises, and of concealing the fact that said defendants were making a secret profit upon the purchase of said premises.

XXVI. That said defendants W.... D.... and H.... M.... falsely represented to said corporation and stockholders thereof, and induced them to believe, and said corporation and said stockholders did believe, that said premises had been purchased for said corporation at the price of dollars, of which dollars had been paid in cash, and the balance of which was represented by mortgages on said premises.

XXVII. That the amount collected by said W.... D.... and H.... M.... from said subscribers, inclusive of their own subscriptions, in carrying out said fraudulent scheme, was as above set forth, ... dollars; that the amount paid to said W.... & U.... for said premises, was as above set forth, ... dollars; that the amount paid to said W.... Z.... for his interest in said contract or option, was as above set forth, ... dollars; that the total amount paid for said premises by all of said defendants was dollars; that the balance of said dollars, to-wit, ... dollars, has been unlawfully converted by said defendants to their own use, between on or about the day of, 19.., and the day of, 19.., as plaintiff is informed and believes, said D.... D.... and D.... M.... receiving as their share thereof dollars, of which dollars was paid out by them as aforesaid, and said W.... D.... and H.... M.... receiving as their share dollars.

XXVIII. That by reason of the premises, said defendants

are jointly indebted to plaintiff in the sum of dollars, with interest thereon from the day of, 19...

WHEREFORE plaintiff demands judgment against said defendants for said sum of dollars, with interest as aforesaid from the day of, 19.., and costs of this action, and such other and further relief as may be just.

1229. Complaint in equitable action by stockholders on behalf of corporation against fraudulent promoters where corporate officers refuse to sue.

[Make corporation a party defendant with the promoters and after alleging its corporate existence, as in the last preceding forms, proceed substantially as follows]:

That the plaintiffs are all stockholders in said corporation, and that all of them [except A.... B....] agreed to take the stock which they hold before the organization of said corporation, and signed an agreement to that effect, hereinafter set forth. *[After setting forth facts showing the obtaining of subscriptions, the organization of the corporation, and the fraud practiced on the corporation, as in the preceding forms, proceed to allege the reasons why the action is not brought by the corporation, as for instance]:*

That the plaintiffs first learned the truth in regard to the said sale of land to the corporation, and the fraud practiced by the defendants [*promoters*] about, 19.., and that they have in no manner ratified the sale of said land to the corporation after knowledge of the facts of said fraud, nor has said corporation ratified said sale. That this action is brought by the plaintiffs and not by the said corporation because the board of directors thereof is entirely controlled by the said defendants [*promoters*]. That nevertheless the plaintiffs on the day of, 19.., and before this action, demanded in writing of said board of directors that an action be brought against said promoters to protect the interests of said corporation and its stockholders, and to recover the amount so fraudulently obtained by the said promoters [*or, to rescind the sale*] but that said board of directors refused to bring such action, or any action whatever against said [*promoters*].

[Demand judgment in favor of the corporation for the amount of fraudulent profits retained by promoters, or if rescission is sought, demand judgment substantially as follows]:

WHEREFORE the plaintiffs demand judgment on behalf of said corporation, that the aforesaid contract of sale of said land to said corporation be rescinded and set aside, that the said

corporation be adjudged to reconvey to said [promoters] the said land, and that the said [promoters] be adjudged to repay to said corporation the said sum of dollars [*amount of the purchase price*] with interest from, 19.., and for such other and further relief as may be just and equitable, with costs.

1230. Complaint in action at law by stockholder to recover his individual damages resulting from the fraud of promoters (see *Franey v. Warner*, 96 Wis. 222 s.c. 71 N. W. 81).

[Set forth the facts of the formation of the corporation, the fraud practiced by the promoters, and the illicit profits received by them, as in the preceding forms, and continue]:

That this plaintiff first learned the truth in regard to the said sale of land to said corporation, and the fraud practiced by said defendants, on or about the day of, 19... That on the day of, 19.., the plaintiff made written demand upon the directors of said corporation that they bring action against said defendants to rescind said sale or recover the illicit profits so made by said defendants, but that said directors refused and still refuse to bring said action.

That the plaintiff, as a stockholder of said corporation, has suffered damage resulting from the said fraudulent sale of land to said corporation by said defendants, in the sum of dollars.

WHEREFORE plaintiff demands judgment against the defendants for the sum of dollars, with interest from, 19.., with costs.

CHAPTER LXXVII

COMPLAINTS IN ACTIONS FOR PERPETUAL INJUNCTION.

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| 1231. To restrain unfair competition in trade by imitation of label or infringement of trademark and for damages. | 1240. To restrain repeated trespasses, resulting in a multiplicity of suits. |
| 1232. To restrain publication of a periodical under a name fraudulently imitating the name of the plaintiff's periodical. | 1241. To restrain town officers from opening a highway which has been defectively laid out. |
| 1233. By purchaser of physician's good-will, to enjoin his continuing the practice. | 1242. To restrain prosecutions at law for violation of a void city ordinance. |
| 1234. To enjoin late partner from continuing business after dissolution. | 1243. To restrain the erection and maintenance of an unauthorized telephone pole in front of the plaintiff's store. |
| 1235. For injunction and damages upon breach of covenant by purchaser of secret process of manufacture, not to disclose the same. | 1244. To compel accounting by corporate officers, and restrain them from appropriating corporate moneys. |
| 1236. To restrain negotiation of bill or note, general form. | 1245. By taxpayer to restrain county officers from paying an illegal claim. |
| 1237. The same, another form. | 1246. By taxpayer to restrain collection of fraudulent judgment against school district. |
| 1238. Complaint on a note, against maker and indorser, and seeking to reach collateral securities held by indorser. | 1247. To restrain sheriff from selling land on execution under a judgment which has been compromised and settled, but never discharged. |
| 1239. To obtain interpleader in equity. | |

1231. To restrain unfair competition in trade by imitation of label or infringement of trademark, and for damages.

I. That the plaintiff is, and for a long time previous to the committing of the grievances hereinafter mentioned, had been the manufacturer [or the vendor] of an article [*describe commodity*] known as which he has for years last past offered for sale and sold [in packages, *describing them, if the*

defendant's packages are similar], labelled with his own proper device and trademark, adopted by the plaintiff for that purpose in the year 19.., of which the following is a copy [*or is a specimen: copy of label, or a specimen of same; or, in a similar manner state other trademark*].

II. That by reason of the long experience and great care of the plaintiff in his said business, and the good quality of said [*commodity*], the same has become widely known in the community as a valuable and useful article, and acquired a high reputation as such, and has commanded and still commands an extensive sale at [*and elsewhere*], which is and has been a source of great profit to this plaintiff.

III. That it is known as such article, to the public and to the buyers and consumers thereof, by the said name of and by the plaintiff's own proper device and trademark aforesaid.

IV. That notwithstanding the long and quiet use and enjoyment by the plaintiff of said name and trademark, the defendant, well knowing the premises, but wilfully disregarding the plaintiff's rights, thereafter and in the year 19.. wrongfully [*and fraudulently*] prepared and offered for sale, and now does offer for sale and sell, at and elsewhere, an article in imitation of the plaintiff's article, which [*with intent to deceive and defraud the public and the buyers and consumers thereof*] he has caused to be put up in similar packages, and labelled with a precisely [*or nearly*] similar label, of which false label the following is a copy [*or specimen: copy or a specimen of the false label*].

V. That such intention is calculated to deceive the purchasers and consumers of plaintiff's said article, and actually has and still does mislead many of them to buy the article sold by the defendant, in the belief that it is the article manufactured by the plaintiff, greatly to the diminution of the said business and profits of this plaintiff.

VI. That the article so put up and sold by the defendant in imitation of the plaintiff's article is of a greatly inferior quality [*state in what respects*]; and that by reason of the premises the general esteem and reputation of the said article manufactured by the plaintiff has been injured, greatly to the diminution of the said business and profits of the plaintiff.

[VII. That before this action, and on the day of, 19.., the plaintiff requested the said defendant to desist from his infringement of the plaintiff's trademark as aforesaid, and to pay to the plaintiff what, upon a just accounting, there would be due him therefor; yet the defendant refuses so to do.]

VIII. That by reason of the premises the plaintiff has been injured, to his damage dollars.

WHEREFORE the plaintiff demands judgment against the defendant: (1) That the defendant and his servants and agents be forever restrained from preparing, putting up, selling, or offering for sale said imitation of the plaintiff's article, or any article bearing the name of or any imitation of said name, or bearing said false trademark, or any imitation of the label or trademark of the plaintiff. (2) That the defendant account for and pay over to the plaintiff all the profits realized by him upon sales of said [*commodity*], sold by him with any imitation of plaintiff's trademark. (3) For dollars damages. (4) And for the costs of this action.

1232. To restrain publication of a periodical under a name fraudulently imitating the name of plaintiff's periodical.

I. That he is the proprietor and publisher of a newspaper [*or magazine, or almanac, or other periodical*] at known and distinguished as [*name of the plaintiff's publication*]; and that as such proprietor he has published the same daily [*or, monthly, or otherwise*] for years last past, and that such publication has been made by the plaintiff, and those through whom he purchased the same, as the owners and proprietors thereof, since the original establishment of the same in the year 19.. under that name.

[*Continue substantially as in preceding form, giving copy of the headings or title-pages, if defendant has imitated the appearance of plaintiff's, and substituting "publication" for "commodity" and "subscribers and readers" for "consumers," etc.*]

1233. By purchaser of physician's good-will, to enjoin his continuing the practice.¹

I. That in the month of, 19.., the defendant being a physician practicing in in the county of and its vicinity, for and in consideration that the plaintiff would purchase of him [his dwelling-house, and lot, and office in that village, and the furniture thereof, and] the good-will of his practice, for the sum of dollars, the defendant agreed with the plaintiff that he would not practice medicine, or in any manner do business as a physician, in said county, at any time after the day of, 19..

¹ Sustained against demurrer, in *Holbrook v. Waters*, 9 How. Pr. 335. See Form 845 for complaint asking only damages.

II. That the plaintiff accordingly purchased from the defendant his said for the price and at the terms aforesaid, and paid said sum of dollars, for the good-will of said business.

III. That the plaintiff duly performed all the conditions of said agreement on his part.

IV. That the defendant, in violation of his said agreement, afterwards returned to and commenced, and still continues to practice medicine, and to do business as a physician in said county.

WHEREFORE the plaintiff demands: (1) That the said defendant be enjoined from continuing so to do. (2) For dollars damages. (3) And for the costs of this action.

1234. To enjoin late partner from continuing business after dissolution.

I. That on the day of, 19.., the plaintiff and defendant being [*or* about to become] partners, carrying on the business of at they both executed under their hands and seals, articles of copartnership for the regulation of their said business; by which, in consideration of the premises, and of the mutual agreement thereto, it was among other things provided that in case of the dissolution of the partnership neither of them should continue business in the building occupied by the firm, nor within one block thereof, for the space of after such dissolution, without the consent of the other.

II. That on the day of, 19.., said partnership was dissolved by mutual consent.

III. That the defendant is now, and within after said dissolution, carrying on such business at No., ... Street, in said city, being within one block of the same premises occupied by the late firm, and declares his intention to persist in so doing. That he has put placards on the door announcing his establishment in said business there, and has attempted to advertise the same facts in the public papers; and is employing servants on the premises in the said business.

IV. That the plaintiff has not consented to these proceedings by the defendant, but has objected thereto, and requested him to desist therefrom, which he refuses to do.

V. That the plaintiff has not continued in business on the said premises, nor within one block thereof, but is endeavoring to establish himself in said business at No. in Street; but is unable to do so by reason of the defendant's acts aforesaid, and the injury to the plaintiff by the acts complained of cannot be fully compensated in damages.

WHEREFORE the plaintiff demands judgment that the defendant, his agents and servants be restrained by injunction from carrying on, or in any wise engaging in said business in the building known as No. in Street, in the said city, or within one block thereof, for the term of from the day of, 19..; and, also, from advertising or announcing in any manner his location in business there during such term, or putting or keeping up any signs or placards for that purpose, and that the plaintiff recover his costs of this action.

1235. For injunction and damages upon breach of covenant by purchaser of secret process of manufacture, not to disclose the same (sustained against demurrer in *Hammer v. Barnes*, 26 How. Pr. 174).

I. That the plaintiff is by trade a brewer, and teacher of the art of brewing in the city of New York.

II. That by many years of labor and expending large sums of money in experiments, he became possessed of a knowledge of brewing ale by a new and improved process, which was and is an important secret of his trade, whereby the ale as so manufactured was of a better quality than that manufactured by the old and generally used process, and whereby a great saving of malt was effected; and the keeping qualities of ale so manufactured by plaintiff's process, were better than that manufactured or brewed by the old process. And that said knowledge or discovery was employed and used by this plaintiff in manufacturing, at his brewery in an ale greatly liked and sought after by the public; and the said knowledge or discovery was of great value to him in his said brewing business, and of great value to any one engaged in the brewing business, to whom he should impart it; and the plaintiff made it his principal avocation for several years past to communicate his improved process of brewing to other brewers for a consideration, whereby he acquired great gains, a fact well known to the defendants.

III. That his said improved process is not, as he is advised and believes, the subject of a patent under the patent laws of the United States, it not being of such a nature as required by the law to be patentable; that therefore he never obtained a patent-right on said process, although he did obtain several patents for brewing-utensils; consequently he has no protection against the acts of the defendants except in the preventive remedy of this court.

IV. That, as he is advised and believes, his said process is

not a matter which can be readily and specifically set forth in a written description thereof in such full, clear, and exact terms, avoiding unnecessary prolixity, as that the manner and process of making, using, and compounding the same could be readily understood by any person skilled in the art, so that such person thereby would be enabled to make, construct, compound, and use the same.

V. That on or about the day of, 19..., the said defendants S.... S.... and A.... B...., composing the firm of A.... B.... & Co., and who were engaged in the business of brewing in applied to the plaintiff to communicate said process to them, as they were desirous of adopting the same, for the sole purpose of improving the quality of the ale to be thereafter manufactured by the defendants in their brewery in which process the plaintiff was willing to communicate to them for a moderate sum, which would be considered nominal between the parties when compared with the value of said improvements, provided the said A.... B.... & Co. would bind themselves not to communicate the same, or any part thereof, either directly or indirectly, to any other person or persons, except the defendant C.... N....; and provided, also, that they, said defendants, would not afford facilities, by neglect, carelessness, or otherwise, so that the said process, or any part thereof, would be discovered by any other person or persons; and provided, further, that the said defendant C.... N.... should make no other use whatever of the said process, or any part thereof, but only for the benefit of the said A.... B.... & Co., by being used in their brewery described; and provided, also, that they, the said defendants, would well and truly keep the covenants and stipulations in the agreement and bond hereinafter set forth, agreed to be preserved and kept, it being a further and tacit stipulation between the parties that the plaintiff might be at liberty to refer to the said A.... B.... & Co., as a reference to substantiate the value of his said improvement.

VI. That thereupon, and on said day, the plaintiff and the said defendants S.... S.... and A.... B...., composing said firm as aforesaid, entered into the agreement, of which the following is a copy [*copy of agreement*].

VII. That in and by said agreement, the said S.... S.... and A.... B.... accepted all and singular the conditions aforesaid; and, as additional security, executed and delivered to this plaintiff their bond, of which the following is a copy [*copy of bond for performance of agreement*]. It being, however, expressly understood by and between the parties, and so stipulated therein, that they, said A.... B.... & Co., should be

bound and held unto the plaintiff as well by and under the covenants in the said agreement contained as by and under the penalty and condition of the said bond.

VIII. That the plaintiff, in fulfillment and compliance with the conditions and covenants in said agreement contained to be done and fulfilled on his part, did therefore communicate to said S.... S.... his process of brewing as covenanted by him in said agreement, and gave him all necessary explanation in regard thereto; whereby the firm of A.... B.... & Co. were entitled to, and did, brew by means of said process of the plaintiff, at their said brewery in ale of a far superior quality to that which they were brewing previously, by the old process, and thereby they saved large quantities of malt; to their great advantage, reputation, and profit, and they still continue to manufacture ale under said process. And the plaintiff further saith, that he in all things duly performed the conditions on his part.

IX. That the said defendants S.... S.... and A.... B...., composing said firm as aforesaid, and the defendant C.... N.... have, in violation of the express covenants and conditions in said agreement contained, made by the said defendants A.... B.... & Co., since the execution and delivery of said agreement, communicated said process, knowledge, and secret of trade given to them as aforesaid by the plaintiff, in the brewing of ale, to divers parties and persons engaged in brewing ales, to-wit [*naming them*] and other persons; and have afforded said several and other persons, by their neglect, carelessness, and otherwise, facilities in discovering said plaintiff's process, and certain parts thereof; so that the said several firms above named, and others, have been enabled, under and by means of such communication and knowledge, and by reason of said carelessness, neglect, and facilities otherwise given, to manufacture, and are still manufacturing, large quantities of ale by using the said improvements of the plaintiff in their brewings, to the great advantage, profit, and reputation of said firms, and to the detriment and damage of the plaintiff; and thereby have enabled the said several persons and firms to bring into market and sell a quantity of ale superior to that brewed by them by the old process, and similar to that of the plaintiff; and thereby have interfered, indirectly and directly, with the ale trade of the plaintiff.

X. That the said defendants have communicated said knowledge and secret of trade in regard to the plaintiff's improved process of brewing ale to said several firms, and to other persons, and each thereof, for and in consideration of certain sums

of money paid to and received by the defendants A.... B.... and S.... S.... from said firms and from other persons respectively; and also for and in consideration of certain promises and inducements made and held out to the said A.... B.... and S.... S.... by said several named persons and others, and by each of them.

XI. That although it was definitely and distinctly understood that the said defendants should not, in any way, interfere with his, the plaintiff's rights and business as a teacher of brewing, yet, in fraud of the rights of the plaintiff, they, the defendants, S.... S.... and A.... B...., as well as the said defendant C.... N...., who has become possessed of said knowledge as manager of A.... B.... & Co., under the said agreement, are ready and willing and offer to instruct and inform any and all the brewers that they may think proper to, in and of the plaintiff's said improved process in the brewing of ale, for sums of money far less than the sum generally charged by the plaintiff for communicating his process, and thus underselling him. That they have held themselves out to the world as ready and willing so to do, and thereby have seriously interfered with the avocation of the plaintiff as a teacher of brewing.

XII. That prior and subsequently to the execution and delivery of said agreement, the said [*persons named in paragraph IX*] were in negotiation with this plaintiff on the subject of the plaintiff's communicating to them his process of brewing. That said negotiations had, as the plaintiff believes, progressed to such a point as that the said several parties would have acceded to this plaintiff's terms in communicating to them, and each of them, his said process; but that while negotiations were pending between this plaintiff and said several parties, the said several parties obtained, and the said defendants secretly, and without plaintiff's consent, and in fraud of his rights, communicated to them the plaintiff's process of brewing ale, in plain violation of the conditions of said bond and of the covenants in said agreement; and said several parties, each and all of them, thereafter declined and refused to purchase said process of the plaintiff; and this plaintiff verily believes that the said several parties and firms would have been willing to have given the sum of dollars, or a large sum of money, each, to the plaintiff for such of his instructions in his said improved process of brewing ale, if the same had not been obtained from the said defendants A.... B.... & Co.

XIII. That the plaintiff, in all the communications which he has made of said process to others, has done it for a valuable consideration, and also under express stipulation to preserve the

secret on the part of those to whom it has been communicated, similar in terms and effect to the contract of the said A.... B.... & Co., so that the plaintiff has maintained the value of his said process, until the wrongful acts of the said defendants, by preserving it from the knowledge of the brewing trade, except where he communicated it for value received. But now, by the wrongful acts of the said defendants, the said secret processes have been disclosed to so many who are not bound by any contract with the plaintiff to refrain from disclosing the same, that its value as a secret is very much diminished, and will be still further diminished unless the said defendants, and each of them, is restrained from further imparting said secret to others. That the amount of such injury cannot be estimated in money, nor can it be compensated directly, save by the preventive remedy of this court.

XIV. The plaintiff further shows that he had also, at the time of making said agreement, and down to the time of the violation thereof by the defendants A.... B.... & Co., in addition to his occupation of teaching brewers, a large and profitable interest in a business at in brewing and selling ale. That one great motive and object of the covenants and stipulations on the part of the defendants A.... B.... & Co., in the said agreement and bond contained, was that they, the said A.... B.... & Co. should not impart said improvements to other brewers, who thereby would be enabled to bring into market in aforesaid, and in the other parts of the United States, an ale superior to that brewed by them under the old process, similar in quality to that brewed by the plaintiff; and therefore it was provided in and by said agreement, that the said A.... B.... & Co. should not in any way injure or interfere with the ale trade of the plaintiff, or to offer or to sell, directly or indirectly, ale or any malt liquor to any person or persons who had been furnished by this plaintiff with said ale. That by reason of said acts and doings of the defendants in the premises, the interests in the said trade and business of the plaintiff stands in danger of being greatly injured and reduced in amount, and interfered with by the aforesaid violation of said agreement by the defendants A.... B.... & Co., in this, to-wit: that the said [*persons named in paragraph IX*] and the other persons to whom the defendants have communicated the process, have already injured and interfered with, and will interfere with the plaintiff's said business and trade, and his occupation as a teacher, in offering to sell, and in selling at lower prices and on easier terms than those of the plaintiff, ale manufactured under plaintiff's said improved process, to his customers, and those he had been

in the habit of supplying with said ale, which act and doings the said A.... B.... & Co., under their said agreement, were especially restricted from doing, and which several acts and doings have a tendency to, and will occasion irreparable injury to this plaintiff, which cannot be estimated directly, and is not susceptible of exact proof, but which if allowed to continue pending this litigation, will render ineffectual any judgment the plaintiff may obtain in this action.

XV. And the plaintiff further shows, that the said defendants A.... B.... & Co., and each of them, have not sufficient responsibility to respond to the plaintiff, as he believes, even for the amount of damages provided to be paid in and by the terms of said bond; and he believes that he will be wholly without any pecuniary remedy for any damages sustained by the breach of said covenants, unless they are enjoined by the court.

XVI. That by the aforesaid violation of the said agreement by the defendants S.... S.... and A.... B.... the plaintiff has been directly damaged and injured in a great amount, to-wit, ... dollars, in addition to the said dollars; which last sum he claims due him from them by reason of the breach of the conditions of said bond.

XVII. That for the purposes of the relief by injunction hereinafter prayed for, the plaintiff makes the said C.... N.... a party defendant in this action for that purpose and view only; and the plaintiff avers that the said C.... N.... well knew of the agreement and covenants, and bond aforesaid, and its and their various stipulations at the time of the imparting to him of the process referred to in said agreement, and of the violation thereof by the said defendants; and he well knew that by the said agreements and covenants, the said A.... B.... & Co. bound themselves unto this plaintiff, and made themselves responsible to him, for the acts, omissions, and carelessness of the said C.... N.... in the premises, and that the said C.... N.... as agent and manager of the brewery of A.... B.... & Co. participated with the other said defendants in the said violation.

WHEREFORE the plaintiff prays judgment: (1) Against the said defendants S.... S.... and A.... B.... for the amount of liquidated damages provided to be paid in and by the said bond, to-wit, the sum of dollars. (2) The further and additional sum of dollars as additional damages sustained by him by reason of the violation of said agreement by them, over and above the damages in said bond provided for. (3) That the said defendants S.... S...., A.... B.... and C.... N.... be forever enjoined and restrained from com-

municating in any manner, either directly or indirectly, now or at any time hereafter, to any person or persons, any knowledge or information in relation to or concerning the plaintiff's said improved process of brewing ale, which was imparted to said S.... S.... under said agreement of, 19.., by the plaintiff, so that the said process of brewing, or any part thereof, shall be discovered by any person or persons whomsoever. And, also, in the mean time, until said judgment enjoining and restraining the said defendants, and each of them, from the acts aforesaid, until the further order of this court. (4) That the said defendants A.... B.... and S.... S.... in addition to paying him the liquidated damages provided to be paid to him in and by said agreement, may also be adjudged and decreed to pay to him, the plaintiff, such additional damages as he may have sustained by reason of such other breaches of the covenants in this action as may not be included in said breach, calling for said dollars. (5) That the said two named defendants, and each of them, may be adjudged and decreed to be the trustees of this plaintiff, for the moneys received by them from said several parties, and from others, for said instructions, and to account to him, the plaintiff, therefor; and until such accounting, that he, this plaintiff, may have an order for injunction and receiver in this action. (6) And he further prays for such other and further relief in the premises against the two defendants A.... B.... and S.... S.... as may be just, and that he may have judgment thereon, with costs of suit.

1236. To restrain negotiation of bill or note, general form.

[*Allege making of note for specified object, and its failure, e. g., as in Form 872.*]

II. That the defendant still retains said note in his possession; and though, on the day of, 19.., the plaintiff requested him to deliver it up, he refused so to do.

WHEREFORE the plaintiff demands judgment: (1) That the defendant be enjoined from negotiating, transferring, or enforcing the same. (2) That it be delivered up and cancelled: (3) And for the costs of this action.

1237. The same, another form.

I. That on the day of, 19.., he made and delivered to the defendant a promissory note in the words and figures following [*insert copy of note*].

II. That the said note was given as the purchase price of a pretended patent right for an article designated as [*name article*], and that said defendant represented to plaintiff that he

had a valid patent right for said article, when in fact said patent then was and now is void and of no value whatever; but that plaintiff, relying upon said representations of defendant, was induced to make and deliver to him said note, in payment for the said patent right, and has received no consideration of any kind therefor.

III. Upon information and belief, that said defendant still holds said note, and is about to transfer said note to an innocent purchaser for value, in order to prevent the plaintiff from making a defense to the same.

IV. The plaintiff now offers to return and reconvey said pretended patent right to defendant.

WHEREFORE, etc. [*prayer for judgment.*]

1238. Complaint on a note, against maker and indorser, and seeking to reach collateral securities held by indorser (from report of the New York Commissioners of the Code, p. 123).

I. That on the day of, 19.., at the defendant [*maker*] for the purpose of inducing the plaintiff to sell him certain goods, agreed to give him, in payment therefor, the said defendant's promissory note, indorsed by the defendant [*indorser*]; and represented to the plaintiff that the said [*indorser*] would be adequately indemnified, by collateral security for his indorsement.

II. That the plaintiff was thereby induced to sell and deliver to the said [*maker*] certain goods, of the value of dollars.

III. That on the day of, 19.., at in consideration thereof, the said [*maker*] by his promissory note, promised to pay to the order of the said [*indorser*] dollars months [*or days*] after said date.

IV. That the said [*indorser*] indorsed the same to the plaintiff.

V. That on the day of, 19.., the same was presented to the said [*maker*] for payment, but was not paid.

VI. That due notice thereof was given to said [*indorser*].

VII. That the same has not yet been paid.

VIII. That the said [*maker*] when he procured the said indorsement from the said [*indorser*] lodged with him six promissory notes, for the aggregate sum of dollars, made by one M.... N.... and indorsed by the said defendant [*maker*] as security for such indorsement.

IX. That the said defendant [*maker*] is endeavoring to withdraw the said notes from the said [*indorser*] to prevent their application in payment of the demand of the plaintiff on the said indorsement.

X. That the plaintiff has requested the said [*indorser*] to apply the said notes to the payment of the plaintiff's said claim, but he refuses to do so.

WHEREFORE the plaintiff demands judgment: (1) For dollars, with interest from the day of, 19.. (2) That the notes placed in the hands of the said [*indorser*] as security, be applied to the payment of the said sum. (3) That the defendants be restrained by injunction from disposing of the said notes to any person other than the plaintiff.

1239. To obtain interpleader in equity.²

I. That before the making of the claim hereafter mentioned one M.... N.... deposited with the plaintiff [*describe the property*] for [*safe-keeping*].

II. That the defendant W.... X.... claims the same [under an alleged assignment thereof to him from the said M.... N....]

III. That the defendant Y.... Z.... also claims the same [under an order of the said M.... N.... transferring the same to him].

IV. That the plaintiff is ignorant of the respective rights of the defendants.

V. That he has no claim upon the said property, and is ready and willing to deliver it to such persons as the court shall direct.

VI. That this action is not brought by collusion with either of the defendants.

WHEREFORE the plaintiff demands judgment: (1) That the defendants be restrained, by injunction, from taking any proceedings against the plaintiff in relation thereto. (2) That they be required to interplead together concerning their claims to the said property. (3) [That some person be authorized to receive the said property pending such litigation.] (4) That upon delivering the same to such [person] the plaintiff be discharged from all liability to either of the defendants in relation thereto. (5) And that the plaintiff's costs be paid out of the same.

²The ancient action in equity for interpleader is now generally superseded by statutory provisions, and the action can only be

brought in a case where the statutory relief is not obtainable. McDonald v. Allen, 37 Wis. 108.

1240. To restrain repeated trespass, resulting in multiplicity of suits (adapted from complaint sustained in *Miller v. Hoeschler*, 121 Wis. 558).

I. That at and for many years prior to the times hereinafter stated, the plaintiff was and still is the owner and in possession of the following described parcel of land [*describe same*], and has maintained, and still does maintain a dwelling-house upon the said lands, standing within feet of the west boundary line thereof.

II. That some time in the month of, 19.., the defendant, without the consent of the plaintiff, forcibly entered upon the said parcel of land, and constructed a fence along the entire east side of said parcel and within two feet of the plaintiff's said dwelling house, and thereby cut off from the plaintiff's said premises a strip of land feet in width, comprising a part of his door-yard, and also cut off the plaintiff from egress from his said premises to Street, a public highway in said city, and entirely excluded the plaintiff from the use of said strip of land; that the plaintiff immediately removed the said fence so constructed by the defendant [*if the defendant reconstructed the fence and committed further trespasses, set them forth*].

III. That the said defendant threatens and asserts that he will reconstruct said fence at the place aforesaid as often as the plaintiff removes the same, and will construct a building partially upon the said strip of land, and thus permanently deprive the plaintiff of the use and enjoyment thereof, and the plaintiff fears that the said defendant will carry out his said threats unless restrained by the judgment of this court, and that if the defendant does continue said trespass he will put the plaintiff to irreparable injury, and will harass, vex and annoy the plaintiff, and will put him to the necessity of bringing a multiplicity of actions to protect his rights.

WHEREFORE plaintiff demands judgment that the said defendant, his agents and attorneys, and all persons claiming by or under him subsequent to the filing of a notice of the pendency of this action, be perpetually enjoined, and restrained from taking possession of or attempting to take possession of the said strip of land, and from placing any obstruction thereon, or in any manner interfering with the use and occupation thereof by the plaintiff; and that the plaintiff have such other and further relief as may be equitable, together with the costs of this action.

1241. To restrain town officers from opening a highway which has been defectively laid out (adapted from the complaint sustained in *Richland v. Jones*, 55 Wis. 673).

I. That on and prior to the day of, 19.., the plaintiff was and still is the owner and in possession of the following described land [*describe the land*].

II. That on the day of, 19.., a petition was presented to the supervisors of the said town of, signed by more than six freeholders of the said town, praying that a highway be laid out as follows [*describe the proposed highway*], which said proposed highway would, if laid out, run through and across the said land of the plaintiff, as well as several parcels of land in said town owned and possessed by C.... D...., E.... F.... and G.... H...., described as [*describe each parcel, giving the ownership thereof*].

III. That upon the filing of said petition, the supervisors of said town caused notice to be given that they would meet on the day of, 19.., at o'clock in the noon, at to decide upon said location; that at the time and place so fixed the said supervisors met, and adjourned the said meeting to [*give date and place*], and gave due notice of such adjournment; that at the time and place last mentioned the supervisors again met, and adjourned said meeting to the day of, 19.., and gave notice of such adjournment, but designated no place where said adjourned meeting would be held; that upon the said last named date said supervisors met pursuant to said adjournment, and not otherwise, and attempted to decide upon said petition, and made and signed an order purporting to lay out said highway in accordance with said petition, in which said order said highway was described as follows [*give description*].

IV. That said highway, as by said order laid out, runs over and through the said lands of the plaintiff, and the said lands of the said C.... D...., E.... F.... and G.... H....; that neither the said plaintiff, nor the said C.... D...., E.... F.... and G.... H.... consented to the making of the said order laying out the said highway, nor made any agreement with the said supervisors concerning the damages by them sustained by reason of the laying out of said highway, nor did either the plaintiff nor the said C.... D...., E.... F.... and G.... H.... realize the said damages. That the said supervisors, by an order made on the day of, 19.., pretended to assess the damages resulting from the laying out of

said highway, and awarded as such damages to the plaintiff the sum of dollars, but that the said supervisors did not estimate the damages sustained by the said C.... D...., E.... F.... and G.... H...., or either of them, nor award to them any damages from the laying out of said highway.

V. That on the day of, 19.., the said supervisors gave notice in writing to the plaintiff, requiring him to remove the fences upon his said lands within the bounds of said proposed highway, as aforesaid, and that it is the intention of said supervisors, if the plaintiff does not remove his said fences on or before the day of, 19.., to cause the same to be removed and to open said highway, and the said supervisors assert that they will cause the said highway to be opened and the said fences to be removed in case the plaintiff does not remove the same in accordance with said order.

VI. That by reason of the fact that the said supervisors adjourned their said first meeting for more than thirty days before deciding upon such application they lost jurisdiction of said proceeding, and their said order of, 19.., is for that reason wholly void; that said last named order is also void by reason of the fact that said supervisors assessed and awarded no damages to the said C.... D...., E.... F.... and G.... H.... for the laying of said highway upon their lands, as aforesaid; that by reason of the said facts said supervisors have no legal right to cause a removal of the plaintiff's said fences, but that unless restrained by this court said supervisors will remove the said fences and open said highway, to the great and irreparable injury of the plaintiff.

WHEREFORE the plaintiff demands judgment that the said order laying out said pretended highway be declared void, and that the said supervisors, and their successors in office, be perpetually enjoined from removing the plaintiff's said fences within the limits of said proposed highway, or any part of such fences, and from opening the said highway; and for such other relief as may be equitable, with the costs of this action.

1242. To restrain prosecutions at law for violation of a void city ordinance (adapted from complaint in Schlitz Brewing Co. v. Superior, 117 Wis. 297).

I. That at the times hereinafter mentioned the plaintiff was and still is a corporation organized under the laws of the state of, and that the defendant, the city of is a municipal corporation organized under the laws of said state, and that the defendants C.... D.... and E.... F.... are respectively the mayor and city clerk of the said city of

II. That the plaintiff has been for many years, and now is, engaged in the manufacture and sale of malt liquors having its principal office in the city of in said state, where it has a large and extensive manufactory, and that for more than one year last past it has established and maintained in said city a warehouse for the storing of the product of its manufactory, and used by it in the conduct of its business in said city of of the value of dollars.

III. That in the usual and ordinary course of its business the plaintiff has shipped, at frequent intervals, from its manufactory in to the said city of a part of the product of its said manufactory in barrels, kegs, and bottles, and has kept the same in its said warehouse in until delivered to its customers in the said last named city, but that the plaintiff has not sold, nor does it now sell or offer for sale, at said last named city, any of said product in quantities less than one gallon, or in any other quantity to be drunk in or about said warehouse; that the business of the said plaintiff at said last named city consists simply and only in maintaining said product in said store-house, and delivering therefrom in original packages, to its customers in said last named city, the said product of its manufactory, and that said warehouse is used, and has been used simply as a place of storage for the said product, and for no different purpose. That the said plaintiff employs an agent at said last named city to take orders for its said product, and to deliver the same to various parts of the said city and elsewhere, and that the taking of such orders and the delivery of said product are not confined to said warehouse, but extend to other and various parts of said city, and to other and various buildings therein, and that such business has been heretofore carried on without regulation or supervision by said city, and without necessity therefor.

IV. That on or about the day of, 19.., the said city adopted an ordinance, which was thereafter published according to law and went into force and effect, wherein it was provided among other things, as follows [*set forth ordinance, as adopted,—in the case in question the ordinance provided for the obtaining of a license and giving of a bond by dealers in malt liquors*].

V. That the said ordinance is invalid and void, for the following reasons [*here set out the reasons for the invalidity of the ordinance,—in the case from which the present form is adapted the reasons alleged were that the common council had no power under its charter to pass such an ordinance, that the same was discriminating and in restraint of trade*].

VI. That said defendant, city of and the other defendants, as its officers, have given out and threatened that they will enforce the provisions of said ordinance, and will file complaints and institute actions against the plaintiff, for the purpose of recovering the fines and penalties mentioned therein for the violation thereof, and will continue, from time to time, to file such complaints and institute such suits, and thereby create and carry on a multiplicity of suits against the plaintiff, and compel the plaintiff to pay out a large amount of money in fines and penalties, and will cause the frequent arrest of the plaintiff's officers and agents, and that the plaintiff fears that unless restrained by the judgment of this court, the said defendants will carry out their said threats, and the business of the plaintiff will be utterly destroyed in said city, and irreparable injury will be done to the plaintiff, and the plaintiff will be subjected to a multiplicity of suits, as aforesaid.

WHEREFORE the plaintiff prays that the said ordinance be declared null and void, and that said defendants be enjoined and restrained from enforcing or attempting to enforce said ordinance by the judgment of this court; and for such other relief as may be just and equitable, with costs.

1243. To restrain the erection and maintenance of an unauthorized telephone pole in front of the plaintiff's store (adapted from complaint in Krueger v. Wisconsin Tel. Co., 106 Wis. 96).

I. [*Allege corporate existence and business of the corporation, as in Form 539.*]

II. That at the times hereinafter mentioned the plaintiff was, and still is, the owner and in possession of the following described real estate [*describe same*], and that the plaintiff's title extends to the center of Street in said city of, which street bounds said property on the south, and to the center of Street in said city, which bounds said property on the east.

III. That there is now, and has been for several years last past, a large and valuable building on the said real estate, which said building is the property of the said plaintiff, and has been and is used for a drug store and abuts upon the said streets, the front of which store is constructed of glass doors and windows for the purpose of furnishing light, and that any obstruction in front of said windows materially and injuriously interferes with the use and enjoyment of said property, and depreciates its value, which said depreciation is constant and continuing, and cannot be adequately compensated in damages.

IV. That on or about the day of, 19.., the defendant unlawfully and against the will of the plaintiff, entered upon and took possession of a strip of land along the easterly and southerly side of said building, and upon the said lands of the plaintiff, and unlawfully excavated earth therefrom, and set in and upon the said lands a large and unsightly pole, and placed wires and cables and other material thereon, along and across the said lands of the plaintiff, which said pole and wires and cables thereon materially encumbers the said property and obstructs the view from the south side of said store, and interferes with the use and enjoyment of said property.

V. That said defendant declares its intention and purpose to keep and hold possession of the said land, and maintain the said pole, wires and cables thereon, without paying compensation therefor to the plaintiff, and without leave or license from the said city of, and that if the defendant is allowed so to hold possession of said land, and maintain said pole, wires and cables, they will inflict great injury upon the plaintiff's said property, which injury will be irreparable.

WHEREFORE the plaintiff demands judgment for the sum of dollars, his damages already sustained, and that the defendant be required to remove the said pole, wires and cables from the plaintiff's said land, and be forever enjoined and restrained from maintaining the same upon said lands, and for such other and further relief as shall be equitable, together with the costs of this action.

1244. To compel accounting by corporate officers, and restrain them from appropriating corporate moneys (adapted from complaint in Consolidated Vinegar Works v. Brew, 112 Wis. 610).

I. [*Allege incorporation of the plaintiff and its business, as in Form 539.*]

II. That on the day of, 19.., the defendant was duly elected secretary and treasurer of said corporation, and still is such officer, and that his duties, among other things, are to keep true books of account of the business of said corporation, and receive, receipt for, and properly disburse all corporate moneys, and render accounts therefor when required by the plaintiff or board of directors of said corporation.

III. That the assets of said corporation consists of manufactured product, of fixtures used in the manufacture of said product, and of outstanding accounts which the defendant has been and is collecting, and that the liabilities of said corporation consists of outstanding notes and claims for merchandise, amount-

ing in all to the sum of dollars, and that the assets of the plaintiff if collected and paid in are sufficient to pay all of said liabilities.

IV. That since the day of, 19.., the said defendant, as treasurer aforesaid, has collected upon the accounts due said corporation, the sum of dollars, and has appropriated the same to his own use, and that the defendant still has in his possession and under his control, as such officer, outstanding accounts belonging to the said plaintiff, amounting to about the sum of dollars.

V. That on the day of, 19.., the plaintiff's president demanded of said defendant that he account for the said sum so collected by him, and that the defendant refused to render any account of said moneys, and still refuses to render such account.

VI. That the creditors of said plaintiff are pressing their claims, and that unless the money belonging to the plaintiff, and in the hands of the defendant, is accounted for and paid over by him, the plaintiff fears that its property will be levied upon and sold, and its business greatly injured.

WHEREFORE the plaintiff demands judgment that an accounting be had of the moneys collected by the said defendant belonging to the plaintiff, and that the said defendant be enjoined from appropriating to his own use any of the moneys so collected, and required to pay said moneys into the treasury of the plaintiff, and that he be further enjoined from collecting any further moneys due to the plaintiff; and that the plaintiff have such other and further relief as may be equitable, and for the costs of this action.

1245. By taxpayer to restrain county officers from paying an illegal claim (adapted from complaint in *Quayle v. Bayfield Co.*, 114 Wis. 108).

I. That at the times hereinafter mentioned the plaintiff was and still is a taxpayer and resident of the county of, and brings this action as such taxpayer on behalf of himself and all other taxpayers of the said county.

II. That at the times hereinafter mentioned the said defendant C.... D.... was and still is the duly elected and acting county clerk of the said county of, and said defendant E.... F.... was and still is the duly elected and acting treasurer of the said county of

III. That on the day of, 19.., the board of supervisors of said county, without authority pretended

to pass a certain resolution authorizing the defendant C.... D...., as county clerk of said county, to draw an order upon the defendant E.... F...., as county treasurer of said county, payable to the defendant G.... H...., for the sum of dollars, and to deliver the same to said G.... H.... upon his filing with said clerk a satisfaction or receipt for said claim.

IV. That the said board of supervisors had no authority whatever to pass said resolution; that said claim is not a valid claim against said county, for the reason that the same identical claim was presented to the board of supervisors of said county more than one year prior to the said day of, 19.. [*date of the allowance*] and was then disallowed in full, whereupon said G.... H.... appealed to the circuit court of said county from such disallowance, and the said action was brought on for trial before the said court and a jury, at the regular term of said court, and a verdict was rendered for the defendant county, upon which verdict, on the day of, 19.., judgment was rendered in favor of said county and against said G.... H...., adjudging said claim to be illegal and void, which judgment still remains in full force and effect.

V. Upon information and belief, that the said G.... H...., and a majority of the members of said board of supervisors have conspired together by unfair and unjust means to secure the payment of said illegal and void claim, and that the action of the said board of supervisors in authorizing the payment thereof as aforesaid, is the result of the said unlawful conspiracy.

VI. That if the said claim is paid, it will necessarily increase the taxes of this plaintiff, and all other taxpayers of said county, and thereby injuriously deprive the plaintiff and said taxpayers of their money, and that the plaintiff has no adequate remedy at law.

VII. That the defendant C.... D...., as clerk aforesaid, threatens to issue said order, and the defendant E.... F.... threatens to pay the same out of the moneys of said county, and that the plaintiff fears that unless enjoined by the judgment of this court the said order will be issued and paid, and the plaintiff and the other taxpayers of said county will be without remedy.

WHEREFORE the plaintiff demands judgment that the said resolution of the said board of supervisors be declared illegal and void, and be cancelled, and that the defendants, and each of them be enjoined and restrained from issuing, receiving, or in any manner paying said order; and for such other and further relief as may be equitable, with the costs of this action.

1246. By taxpayer to restrain collection of fraudulent judgment against school district (adapted from *Balch v. Beach*, 119 Wis. 77).³

I. That the defendant school district No. of the town of is a duly organized school district of the town of, in said county of state of

II. That the plaintiff is a resident, voter, and taxpayer of said school district, and that the defendant C.... D.... is the town clerk of the said town of, and that said C.... D.... is about to levy a tax for the payment of the judgment hereinafter mentioned, and that this plaintiff brings this action as such resident and taxpayer, in his own behalf, and on behalf of all other residents and taxpayers of such school district.

III. That the defendant C.... D.... is the duly elected and qualified and acting town clerk of said town of, and is also the plaintiff in the judgment hereinafter set forth, and claims to be the owner thereof.

IV. That at the times hereinafter mentioned, the assessed valuation of all taxable property within the said district did not exceed the sum of dollars, and that at a special school district meeting, held in and for said district on the day of, 19.., a resolution was duly passed authorizing the school board of said district to borrow the sum of dollars for the purpose of building a school-house in said district, which said resolution was in words and figures, as follows [*copy of resolution*]:

V. That thereafter, and pursuant to said resolution, said sum of dollars was borrowed by said district, and said sum is still owing by said district, and that other sums have been provided by said district for the purpose of building said school-house.

VI. That thereafter the defendant C.... D.... was appointed one of the building committee to superintend the building of the school-house for said district, with said fund. That notwithstanding and only the said sum of dollars

³ An equitable action cannot be maintained in Wisconsin to set aside a judgment. This relief is to be obtained under the code practice by motion. Wis. Stats. 1898 sec. 2879, 2832. Equity will, however, prevent the enforcement of a judgment obtained by fraud, and will also prevent the inequitable use of a judgment. *Crowns v.*

Forest Land Co., 102 Wis. 96. See also *Balch v. Beach*, *supra*; and *Johnson v. Huber*, 106 Wis. 282. In Minnesota an action may be maintained to set aside any judgment obtained by perjury or fraud if brought in the same judicial district within three years after the discovery of the fraud. Minn. Rev. Laws 1905 sec. 4277.

was provided by said district for the purpose of building said school-house, the defendant C.... D...., together with the persons assuming to act as the school board of said district, without authority or legal right, undertook to build and construct a school-house for said district costing more than the sum of dollars, and to make the said expense so incurred a charge and indebtedness against said school district.

VII. That the said defendant C.... D...., and the said persons pretending to act as the school board of said district, in pursuance of said illegal purpose, and prior to the day of, 19.., incurred and contracted indebtedness in the name of said school district to an amount exceeding the sum of dollars, and in excess of the limit of indebtedness which said district was by law authorized to incur, and that the said defendant C.... D...., as such building committee, undertook to employ and did employ various persons to perform work and labor upon said school-house, and attempted to make the claims for such services a charge against the said district, notwithstanding the legal limit of indebtedness which said school district was authorized to incur had been reached, and notwithstanding that all funds which had been provided by said district for the building of said school-house had been expended.

VIII. That thereafter the defendant C.... D.... for the purpose of procuring payment from said district of said illegal claims and demands, procured without consideration an assignment to himself of a large number of said pretended claims against said school district, and thereafter wrongfully and fraudulently colluded with the director and clerk of said school district and commenced an action in the court of county against the said school district upon the said claims, in his own name, and caused the summons and complaint in said action to be served upon said director and clerk upon the day of, 19.., a copy of which complaint is hereunto annexed, marked Exhibit A.

IX. That the said director and clerk of said school district colluded with the plaintiff C.... D.... and concealed all knowledge of the bringing of said action from the plaintiff, and other taxpayers, as well as from the other officers of said district, and fraudulently failed and neglected to interpose any defense to said action, although he well knew that said claims and demands were illegal and void against said district. That said complaint was not filed until after the obtaining of judgment in said action, and that on the day of, 19.., said plaintiff procured judgment upon default in said action upon said demands, with the connivance and consent of the

said director and clerk aforesaid, and caused said judgment to be served upon himself as town clerk of the town of and the said defendant C.... D...., as such town clerk now threatens to levy, and is proceeding to levy the sum of dollars on the taxable property of said school district for the purpose of paying the said fraudulent judgment, and to insert the said sum in the tax-roll of said town, and cause the same to be collected as other taxes are collected.

X. That after the discovery of the entry of said judgment, as aforesaid, the plaintiff demanded of the director and clerk of said school district that an action be begun in the name of said district to set aside said judgment and restrain the collection thereof, but that said clerk and director refused, and still refuse to bring said action, and that the plaintiff and all other citizens and taxpayers of said district are without remedy against said illegal claim and judgment, except in an action in equity.

XI. That the said defendant C.... D.... will, unless restrained by the order and judgment of this court, proceed to levy and collect the said illegal judgment.

WHEREFORE the plaintiff demands that the defendant be enjoined and restrained from levying or attempting to levy the amount of said judgment, or any part thereof, against the taxable property of said school district, and that the plaintiff have such other and further relief as may be equitable, together with the costs of this action.

1247. To restrain sheriff from selling land on execution under a judgment which has been compromised and settled, but never discharged (precedent sustained in *Johnson v. Huber*, 106 Wis. 282).

I. That the defendant E.... F.... was for two years immediately preceding the first Monday of January, 1899, sheriff of said county, duly qualified and acting as such.

II. That prior to the day of, 19.., an action was pending in said court, wherein the said defendant C.... D.... was plaintiff, and this plaintiff was defendant. That on said day of, 19.., such proceedings were had in said action last named that a judgment was duly rendered therein in favor of said defendant C.... D.... plaintiff in said last named action and against this plaintiff A.... B.... defendant therein, for the sum of dollars damages and dollars costs and disbursements therein, which judgment was duly entered and docketed in the office of the clerk of said court on said last named day.

III. That soon after the rendition of said judgment, to-wit, prior to the first day of February, 19.., the said plaintiff, defendant in said last named action, appealed from said judgment against him to the supreme court of the state of and duly perfected said appeal in said supreme court. That this plaintiff was also about to commence an action against C.... D.... for alleged slanderous words spoken by said C.... D.... of this plaintiff. That some time in the month of or, 19.., the said C.... D.... and this plaintiff, through the interposition of friends, agreed that said appeal should be dismissed and that all matters of difference between them should be settled, cancelled and adjusted, and that they would meet together and agree upon the terms of said settlement. That thereupon said appeal was, in consideration of said agreement, duly dismissed and this plaintiff abandoned the prosecution of the action he was about to commence against said C.... D...., defendant therein. That on the day of, 19.., in pursuance of said agreement, and to carry the same into effect, the said C.... D.... and this plaintiff met and this plaintiff then and there agreed to and did pay to the said C.... D...., the plaintiff in said last named action, and defendant herein, the sum of dollars, which said C.... D.... then and there agreed to receive in full satisfaction and discharge of said judgment and of all claims whatsoever. That by the terms of said agreement dollars thereof was then and there paid to said C.... D.... by this plaintiff and dollars was by this plaintiff paid to and received by him, the said C.... D.... in pursuance of the said agreement within days from the said day of, 19..

IV. That on or about the day of, 19.., the said C.... D...., by his attorney, L.... M...., in violation of said agreement, wrongfully caused to be issued out of said court an execution upon said judgment against this plaintiff and in favor of him, said C.... D.... for the amount that appeared of record to be due thereon, to-wit, the said sum of dollars, said execution being under the seal of said court and in due form as prescribed by statute; that said L.... M.... delivered said execution to the said defendant E.... F...., then the sheriff of said county as hereinbefore alleged. That said sheriff now holds said execution and gives out and threatens that he will, by virtue thereof, levy upon and seize the property of this plaintiff, defendant in said execution, to satisfy the same.

V. That plaintiff is the owner in fee simple and in possession

of the following described land, together with numerous other tracts of land, situated in the county of and state of, to-wit [*describe the land*]; and that said defendant C.... D.... claims a lien upon said land by virtue of said judgment, and that said judgment is an apparent lien upon said land and a cloud upon plaintiff's title thereto.

WHEREFORE plaintiff demands the judgment of this court, that said judgment so as aforesaid rendered and docketed in said county in favor of said C.... D.... and against this plaintiff be satisfied and cancelled of record; that said E.... F.... be perpetually restrained and enjoined from making any levy upon or seizure of the property of this plaintiff by virtue of said execution and from taking any action whatever under and pursuant to said execution, except to return the same in pursuance of the order and judgment of the court, and that in the meantime and pending this action and until further order herein, said defendant C.... D.... and said sheriff, their attorneys, agents, deputies, and all persons in any way acting for or representing them, or either of them, be restrained and enjoined from levying said execution upon the property of this plaintiff and from taking any action whatever to enforce said judgment and that the plaintiff may have such other or further order, or judgment as the court shall deem just and equitable.

CHAPTER LXXVIII.

COMPLAINTS IN ACTIONS FOR DIVORCE AND ANNULMENT OF MARRIAGE.

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| 1248. Complaint for divorce on the ground of adultery. | 1255. Allegation of impotency, or physical incapacity. |
| 1249. Complaint for limited divorce on account of cruel and inhuman treatment. | 1256. For annulment of marriage on account of nonage. |
| 1250. Allegation of wilful desertion. | 1257. For annulment on the ground of lunacy. |
| 1251. Allegation of habitual drunkenness. | 1258. For annulment, on the ground of fraud by husband. |
| 1252. Allegation of voluntary separation for five years. | 1259. The same, on the ground of fraud by wife. |
| 1253. Allegation of failure to support, by wife. | 1260. For annulment on account of defendant's prior marriage, plaintiff acting in good faith. |
| 1254. Allegation of conduct rendering it unsafe for wife to live with husband. | 1261. Complaint to affirm validity of marriage. |

The divorce statutes of the various states, while quite similar in general features, differ considerably in detail. The greater part of the forms in this chapter, while primarily adapted to use in Wisconsin, may with proper alteration be adapted for use in the other states. Careful attention should be paid to the statutory requirements in each case, as such actions are entirely regulated by the statute. The statutes governing divorce in the various states are as follows: Wis. Stats. 1898 Chap. 159; Minn. Rev. Laws 1905 Chap. 71; Iowa Code Chap. 3 Title 16; N. Dak. Rev. Codes Chap. 5; S. Dak. Rev. Civ. C. secs. 61, 93; Cobbeys Ann. Stats. of Nebr. secs. 5326, 5370.

1248. Complaint for divorce on the ground of adultery.

I. That on the day of, 19.., at state of the plaintiff and defendant were married, and ever since have been and now are husband and wife.

II. That since said marriage [*or*, since the day of, 19..] and for more than one year immediately preceding the commencement of this action, the plaintiff and defendant have continuously resided, and now reside within this state.

[*This allegation should affirmatively show residence within the state for the time required by the statute. Wis. Stats. 1898 sec. 2359.*]

[*Or, if the marriage is alleged to have taken place within the state, insert here the following:* That since said marriage the plaintiff (and defendant) have continuously resided, and now reside, within this state.]

[*Or, if the adultery is alleged to have been committed within the state:* That the plaintiff, at the time of the commission of the several acts of adultery hereinafter mentioned, was and now is a resident of this state.]

III. That on the day of, 19.., at the house of E.... F.... [*or, at No. Street*] in the city of the said defendant committed adultery with one M.... N.... [*Charge of repetition:* That a few days subsequently thereto, the defendant again committed adultery, at the house aforesaid, with the said M.... N....]

[*Where the precise time is not known:* That between the day of, 19.., and the day of, 19.., at times which the plaintiff is unable more particularly to state, the defendant committed adultery, etc., as above.]

[*Where the place is not known:* That on the day of, 19.., at some place in the city of, which the plaintiff is unable more particularly to state, the defendant, etc., as above.]

[*Where time and place are not known:* That at divers places within the city of and at various times between the day of, 19.., last and this action, but at what particular times and places the said plaintiff is unable to state, the defendant has committed adultery with one M.... N....]

[*Where the paramour is not known:* That on the day of, 19.., at the house of E.... F.... [*or, at No. Street*] in the town of the defendant committed adultery with a man [*or, a woman*] whose name is unknown to the plaintiff [*or, one or more women, whose names are unknown to the plaintiff.*]

IV. That said several acts of adultery were committed without the procurement, privity, or connivance of the plaintiff; and that she has never forgiven or condoned the same, nor voluntarily cohabited with the defendant since she obtained knowledge of said acts, and that three years have not elapsed since the discovery by the plaintiff of the offenses herein charged.

V. That there are no living children of said marriage [*or:* That there are living of the issue of said marriage children,

named, *naming the eldest*, aged years, and, *give names and ages of other children*].

VI. That the moral character of defendant is bad and such as to render him unfit to have the custody of said children [*or: That defendant has no proper home for said children. And state other facts showing that the custody of the children should be awarded to the plaintiff*].

VII. That the plaintiff is wholly without property of her own. [*Or state what property the plaintiff has, and her health and capacity to earn.*]

VIII. That, as plaintiff is informed and believes, the defendant is possessed of personal property to the value of not less than dollars, and of real property worth not less than the sum of dollars; and that the defendant is engaged in the business of [*stating it*] from which he derives an income of dollars, or more, annually.

WHEREFORE the plaintiff demands judgment: (1) That the bonds of marriage subsisting between the plaintiff and defendant be wholly dissolved. (2) That the care and custody of said children may be awarded to her, the said plaintiff, and that the defendant be required to pay such suitable allowance in money for their support, maintenance and education as the court shall deem proper. (3) That the plaintiff be adjudged such alimony out of the defendant's estate, or such share of the defendant's property as shall be just and equitable. (4) That the plaintiff's name be changed to that by which she was known prior to such marriage. (5) That she recover the costs of this action. (6) And for such further relief as may be just.

1249. Complaint for limited divorce on account of cruel and inhuman treatment.

[*Allegations of marriage and residence for a time sufficient to satisfy the particular statute. See the preceding form.*]

That since said marriage the defendant has treated her in a cruel and inhuman manner, and since about the beginning of the year 19.., has repeatedly committed acts of cruelty and violence upon deponent and her children, and in particular as follows [*state the specific acts, e. g., thus: On the day of, 19.., at the defendant, without any provocation, struck and beat the plaintiff, severely injuring her face and breast; and on the day of, 19.., at the defendant again, without any provocation, knocked the plaintiff down, and kicked her in the side; and that defendant's entire course of conduct towards the plaintiff, with rare intervals, has been for a long period uniformly brutal and abusive,*

he being constantly in the habit of applying abusive epithets to her, of threatening her with violence, and of striking and attempting to strike her; and it has become entirely unsafe for her to live with him].

[*Or: That on the day of, 19.., the defendant forcibly expelled her from his residence, and has refused to permit her to return, and has since refused, or neglected, and still does refuse, or neglect to provide for her.*]

[*Insert proper allegations as to children and property, as suggested in the preceding form.*]

WHEREFORE the plaintiff demands judgment of divorce from bed and board forever [*follow with other clauses of prayer, as in preceding form*].

1250. Allegation of wilful desertion.

That although the plaintiff has always conducted herself towards the said defendant as a faithful and obedient wife, the defendant, disregarding his duties as a husband, on or about the day of, 19.., wilfully deserted the plaintiff, and has ever since said time and for more than one year immediately preceding the commencement of this action, uninterruptedly continued said desertion without cause on the part of this plaintiff.

1251. Allegation of habitual drunkenness.

The defendant, disregarding his duties as a husband towards the plaintiff, has been an habitual drunkard for the space of more than one year immediately preceding the commencement of this action [*in Minnesota: immediately preceding the filing of the complaint*].

1252. Allegation of voluntary separation for five years.

That on or about the day of, 19.., the plaintiff and defendant agreed to live entirely separate and apart, and that ever since said time, in pursuance of said agreement, and for more than five years next preceding the commencement of this action, the plaintiff and defendant have voluntarily lived entirely separate from each other.

1253. Allegation of failure to support, by wife.

That ever since the day of, 19.., and for years prior to the commencement of this action, the said defendant * though of sufficient ability, has wholly refused and neglected to provide for the plaintiff.

1254. Allegation of conduct by husband rendering it unsafe for wife to live with him.

[*As in preceding form to the * and continuing*]: has been guilty of conduct toward the plaintiff which renders it unsafe and improper for plaintiff to live with said defendant, in this, that the said defendant has [*here state specifically the conduct complained of*].

1255. Allegation of impotency, or physical incapacity.

That the defendant was, at the time of said marriage, and ever since has remained, physically incapable of entering into the marriage state, or of consummating the said marriage by sexual intercourse, by reason of incurable personal defects, in that [*state the nature of the said incapacity briefly, e. g. thus: the uterus and vagina of the said defendant were, at the time of such intermarriage, and for a long time previous thereto had been, in a diseased and in a schirrous, cartilaginous, and ulcerated state, and unnaturally thickened and indurated*].

1256. For annulment of marriage on account of nonage.

I. [*State appointment of guardian, as in Form 554.*]

II. That on the day of, 19.., at, the plaintiff was in form married to the defendant.

III. That at the time of such marriage they were, and ever since have been, inhabitants of this state [*or state facts as to residence so as to bring the case within the particular statute*].

IV. That at the time of said marriage said plaintiff was but years of age, and incapable of contracting marriage.

V. That said plaintiff and defendant cohabited together until about the day of, 19.., since which time they have not cohabited as man and wife, said plaintiff, at the time said cohabitation ceased being less than years of age.

WHEREFORE plaintiff demands judgment that said marriage between said plaintiff and the defendant may be annulled and declared void, as provided by the statute, and for the costs of this action

1257. For annulment on the ground of lunacy.

[*I, II and III as in preceding form, except that where the plaintiff has been restored to reason omit I.*]

IV. That at the time of such marriage she was a lunatic, and incapable of contracting a marriage; and has been ever since [*or, and that she remained a lunatic for the space of about six months after such marriage*].

V. That her reason was restored about the month of , 19.. , and that she is now of sound mind; but that she has not cohabited with the defendant since she was restored to a sound mind.

WHEREFORE, etc. [*demand for judgment as in preceding form.*]

1258. For annulment, on the ground of fraud by husband.

I. That on the day of , 19.. , at , the plaintiff was in form married to the defendant.

II. That for the purpose of inducing the plaintiff to consent to the said marriage, the defendant falsely and fraudulently represented to her that he was one A. . . . B. . . . , whom the plaintiff knew by reputation to be a respectable and honorable man; and he concealed from the plaintiff his real name and character.

III. That the defendant's real name is, and always was C. . . . D. . . . , and not A. . . . B. . . . ; and that he was and is a man of very bad repute, having been convicted of forgery, and confined in the state prison at in this state, under sentence therefor, for years.

IV. That the plaintiff was induced to consent to the said marriage by the said representations, which she believed at the time of her said marriage to be true [and by her ignorance of the facts so concealed]; and that if the said representations had not been made to her [and said concealment had not been practiced] she would never have consented to the said marriage.

V. That immediately upon her discovery of the falsehood of the said representations, to-wit, on the day of , 19.. , the plaintiff left the defendant's house, and has never since cohabited with him.

WHEREFORE [*demand for judgment as in last preceding form.*]

1259. The same, on the ground of fraud by wife.

[*As in preceding form, but substitute for paragraphs II and III, the following*]:

II. That for the purpose of inducing the plaintiff to consent to the said marriage, the defendant falsely and fraudulently represented to him that she was a chaste and virtuous woman, which representation the plaintiff believed to be true.

III. That defendant was in fact unchaste and of lewd habits, and was the mother of an illegitimate child; which facts the defendant fraudulently concealed from the plaintiff.

1260. For annulment on account of defendant's prior marriage, plaintiff acting in good faith (Cobbey's Ann. Stats. of Nebr. sec. 5354).

[I. and II. *Allege residence and marriage, as in previous forms.*]

III. That said defendant and one E.... F.... were married at in the state of on the day of, 19.., and that they cohabited together as husband and wife until about the day of, 19.., since which time the said E.... F.... remained absent from said defendant, and she had at no time prior to said marriage with the plaintiff either seen or heard from him during said period, but was informed that he was dead, and so believed, and said marriage with plaintiff was entered into with the full belief on the part of the plaintiff and defendant that said E.... F.... was dead.

IV. That said E.... F.... was not dead, and is now living in the state of; that there has been no judgment of divorce between the said E.... F.... and the defendant, and that the defendant is still the lawful wife of the said E.... F....

V. That the issue of said marriage of the plaintiff with the defendant, now living, is as follows [*give names and ages*].

WHEREFORE plaintiff demands judgment that said marriage between the plaintiff and defendant may be declared null and void, and that defendant be adjudged not entitled to dower in plaintiff's real estate, or to any share or interest in his personal estate, and that said marriage be decreed to have been contracted in good faith with the full belief of the parties that E.... F.... was dead, and that the children of said marriage, as aforesaid, be adjudged legitimate issue of the plaintiff; and for such other relief as equity may require.

1261. Complaint to affirm validity of marriage.

[*Allege marriage and residence, as in Form 1248, or as the statute of the particular state may require.*]

III. That the said defendant, ever since the day of, 19.., has denied and still continues to deny the validity of the said marriage, and alleges that the same was void because [*here state the claim of invalidity made*]. But this defendant alleges that in truth and in fact [*here negative the claim of invalidity*] and the said marriage between plaintiff and defendant was and is a valid and binding marriage.

WHEREFORE plaintiff demands judgment that the said marriage be declared valid; and for such further relief as may be just and equitable, and for the costs of this action.

CHAPTER LXXIX.

COMPLAINTS IN ACTIONS BY CREDITORS OF DECEASED PERSONS AGAINST HEIRS, LEGATEES, AND DEVISEES.

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| <p>1262. Complaint in action at law by corporation against legatees of a deceased stockholder, upon a call made after the settlement of the estate of the stockholder for payment of the testator's subscription for stock.</p> <p>1263. Complaint in action at law by the county judge against the heirs of a deceased surety upon a probate bond, the default in</p> | <p>the bond having accrued after the settlement of the estate of the surety.</p> <p>1264. Complaint in equitable action by creditor to recover against heirs and charge real estate received by them and set aside conveyances thereof as fraudulent, there having been no administration of the estate of the debtor.</p> |
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The obvious intent of the statutes of the various states governing the settlement of the estates of deceased persons is that the claims of creditors shall all be presented to and allowed by the probate court, and paid by the executor or administrator out of the non-exempt property of the estate, real as well as personal, before distribution is made to either heirs, legatees or devisees.

Cases sometimes arise, however, where this result has not been accomplished, either by reason of entire lack of any administration proceedings, by failure to take the necessary steps to bar creditors in the administration proceedings, by reason of the fact that a contingent claim did not become absolute until the administration proceedings had been closed, and perhaps from other causes.

The statutes of Wisconsin seem to provide, in substance, three different remedies for cases of this nature:

I. Sections 3269-3273, inclusive, Wis. Stats. 1898, provide for an action at law against the next of kin or legatees of the deceased, jointly or severally, to recover the value of assets that may have been received by them from the estate of the deceased, provided that the plaintiff shows that he has been or will be unable to collect his debt, or some part thereof, in the probate proceedings. This action has been held to be maintainable by a creditor having a contingent claim which did not become absolute until after the time limited for presentation of claims in the probate court had expired and the estate closed [*Mann v.*

Everts, 64 Wis. 372 s.c. 25 N. W. 209; S. M. Co. v. Murphy, 112 Wis. 614 s.c. 88 N. W. 583], also by a creditor holding an absolute claim where the estate of the decedent had never been administered upon in the probate court [McGonigal v. Colter, 32 Wis. 614].

II. Sections 3274-3286, inclusive, Wis. Stats. 1898, provide for an action by any contract creditor of a deceased person against the heirs and devisees of such person to the extent of the real estate which has descended to or been devised to them. This action must be brought jointly against all the heirs or devisees. When brought against heirs the plaintiff must show that the personal assets of the deceased were insufficient to pay his debt, and that the debt or some part thereof can not be collected by proceedings in the probate court or from the next of kin of legatees. When brought against devisees the plaintiff must, in addition to these facts, show that the plaintiff is unable to collect his debt by action against the heirs. The judgment rendered is to be apportioned among the defendants in proportion to the value of the real estate secured by each, and the proper portion docketed against each defendant individually, and when so docketed becomes a lien on the real estate which descended or was devised to him in preference to other judgments for the debts of the heir or devisee. When the real estate has been aliened to an innocent purchaser before the filing of notice of the pendency of the action the judgment does not affect it, but if it be in the hands of a fraudulent grantee such grantee may be made a party to the action and the property reached. Adkins v. Loucks, 107 Wis. 587 s.c. 83 N. W. 934. This action was said, in Blakely v. Smock, 96 Wis. 611 s.c. 71 N. W. 1052, to be purely a legal action, but in Adkins v. Loucks, *supra*, it was said to be an equitable action, no reference being made to the previous case. The nature of the relief sought and obtainable in the action would seem to stamp upon it the character of an action in equity. By the very terms of the sections by which it is created it is clear that it can not be maintained except when it is shown that no remedy can be obtained by an action at law against next of kin or legatees, under sections 3269-3273.

III. Sections 3860 and 3861 Wis. Stats. 1898 provide a third remedy in case of a contingent claim which becomes absolute at any time after the expiration of the time limited for the presentation of claims in county court. By these sections it is provided in substance that such a claim may be presented to the county court at any time within one year after it becomes absolute, and if allowed the executor or administrator shall pay it out of any assets he may then have or thereafter obtain,

not exceeding the proportion paid to other creditors, and if he have not sufficient assets to pay the same, or the proper proportion thereof, the creditor may recover the balance from the heirs, devisees or legatees who have received property from the estate that was liable to pay debts of the deceased.

The Revised Laws of Minnesota 1905 contain provisions quite similar to the Wisconsin provisions before cited as to actions by creditors against heirs, devisees or legatees of the deceased who have received real or personal property from the estate. Chapter 84 secs. 4507 to 4522 inclusive. In that state, however, a contingent claim which becomes absolute at any time before the final settlement of the estate must be presented to that court for allowance or be forever barred. Minn. Rev. Laws 1905 sec. 3730.

There are no such provisions in Iowa. The early case of *Reynolds v. May*, 4 G. Greene, 286, seems to hold that there can be no such action; but in *Janes v. Brown*, 48 Iowa, 568, it is said that the question not having been argued, will not be passed upon. The Iowa Code sec. 3408 provides for an apportionment of costs in an action against heirs and devisees where the judgment is rendered against them in proportion to the amounts received by them from the estate, and authorizes a tender by each of his proportionate share of the liability, thus apparently recognizing that such an action may lie under some circumstances.

In the states of North Dakota and South Dakota the statutes are practically identical, and require the presentation of all claims contingent or otherwise to the probate court on penalty of being barred. If the liability is not absolute at the time of the final settlement the court must order the executor or administrator to retain sufficient assets in his hands to pay it, in North Dakota, and in South Dakota must order the sum to be paid into court to await the determination of the question of absolute liability. N. Dak. Rev. Codes secs. 6401, 6425; S. Dak. Rev. Codes P. C. secs. 170, 296. In both states there are provisions for partial distribution of estates to heirs, devisees or legatees before final settlement, upon their giving bond to pay their proportion of the debts, if necessary, and for the bringing of an action upon such bond in case of breach. N. Dak. Rev. Codes secs. 6504 to 6508; S. Dak. Rev. Codes P. C. secs. 302 to 306.

In Nebraska contingent claims may be presented to the commissioners, and the court may order sufficient assets to be retained by the administrator or executor to discharge the claim, and if it become absolute and be proven to the satisfaction of the court at any time within two years after the time limited to present claims, the creditor will be entitled to receive

payment to the same extent as other creditors, out of the property retained. Cobbey's Ann. Stats. of Nebr. secs. 5123 to 5126. If a claim becomes absolute at any time after the time limited for creditors to present claims it may be presented for allowance at any time within one year after it becomes absolute, and if it be allowed by the court the executor or administrator will be required to pay the same or such proportion as has been paid to other creditors, if he has sufficient assets, and if not, an action will lie against heirs, devisees or legatees who have recovered sufficient property from the estate. Cobbey's Ann. Stats. of Nebr. secs. 5127 to 5131. This action will not lie until the claim has been established against the administrator by proper legal proceedings in the probate or other proper court. Bunkworth v. Hazlett, 64 Nebr. 592 s.c. 90 N. W. 537.

1262. Complaint in action at law by corporation against legatees of a deceased stockholder, upon a call made after the settlement of the estate of the stockholder for payment of the testator's subscription for stock (precedent sustained in South Mil. Co. v. Murphy, 112 Wis. 614 s.c. 88 N. W. 583).

I. That said plaintiff is now, and at all the times hereinafter mentioned was, a corporation organized and existing under and by virtue of the laws of the state of Wisconsin.

II. That at and prior to the making of the subscription to the capital stock of said plaintiff hereinafter mentioned, the articles of incorporation of said company were duly filed and recorded with the register of deeds of the county of, Wisconsin, in which county said company is and ever since its organization has been located, and a duly verified copy of said articles duly filed with the secretary of state of the state of Wisconsin.

III. That in and by said articles the capital stock of said plaintiff is fixed at the sum of dollars, divided into shares of dollars each. That before the transaction of any business by the said corporation, with persons other than its members, more than per cent. of its capital stock was duly subscribed in writing by sundry and divers persons, and more than per cent. of said capital stock was paid in in cash by said subscribers.

IV. That among other subscribers to the capital stock of said plaintiff company, one X. . . . Y. . . ., now deceased, duly subscribed, on or about the day of, 19. . ., for shares of said stock, of the face value of dollars per share, and in and by such subscription agreed to pay

dollars on each share in cash, and the balance of such subscription as the same should be called by the plaintiff.

V. That on or about the day of, 19.., said cash payment of dollars per share upon such subscription to said capital stock was duly made by each of the several subscribers to said stock, including said X.... Y.... That on or about the day of, 19.., a call of per cent. of the face of each subscription to said stock was duly made by the plaintiff, and the amount thereof paid by each subscriber, including said X.... Y....

VI. That on or about the day of, 19.., said X.... Y.... died in the city and county of, Wisconsin, testate, being at the time of his death a resident of and freeholder in said county. That thereafter such proceedings were had in the matter of the estate of said X.... Y...., deceased, in the county court of said county, that the last will of said deceased was duly probated, letters testamentary issued to the executors named in said will, the debts of said deceased and legacies provided for in said will fully paid, the accounts of the executors allowed, and final distribution made of the residue of said estate to the heirs of said deceased, in equal, undivided shares, and said executors were fully discharged. That the final decree in said estate, and the final order of distribution therein, were duly made by said county court on or about the day of, 19.., and that thereby all of the residue of said estate of X.... Y...., deceased, was duly assigned to his children, in equal, undivided fifths, to-wit [*name the legatees, defendants*] who were his heirs and the residuary legatees under said will. That the amount of the property bequeathed and left to said defendants by said last will of said X.... Y...., deceased, and the amount actually received by them from the estate of their said ancestor, as this plaintiff is informed and verily believes, exceeded the sum of dollars.

VII. That subsequent to the death of said X.... Y...., and subsequent to the making of the final order of distribution in the matter of said estate, and the assignment of the residue thereof to the defendants, a call was duly made, pursuant to resolutions of the stockholders of said plaintiff company and of the board of directors of said company, and in pursuance of the by-laws of said company theretofore duly made and adopted, upon all of the subscribers to the capital stock of said plaintiff, for per cent. of the face of each share, payable on the day of, 19.., and per cent. of the face of each share payable on the day of, 19..

VIII. That at the time of the making of said calls the by-

laws of said plaintiff duly provided the manner in which each subscriber, and his representatives and successors in interest, should be notified of said calls, and due notice was given to each of said defendants of said calls, pursuant to said by-laws, and due demand made for the payment thereof, but notwithstanding said demand, the said defendants have hitherto failed and neglected to pay the same or any part thereof, except the sum of dollars.

WHEREFORE plaintiff demands judgment against the defendants for the sum of dollars and interest, together with the costs and disbursements of this action.

1263. Complaint in action at law by the county judge against the heirs of a deceased surety upon a probate bond, the default in the bond having accrued after the settlement of the estate of the surety (adapted from complaint in Mann v. Everts, 64 Wis. 372 s.c. 25 N. W. 209).

STATE OF
..... Court County.

A.... B.... as Judge of the County Court of County, Plaintiff, vs. C.... D.... and E.... F...., Defendants.	}
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The plaintiff, complaining of the defendants, alleges as follows:

I. That the plaintiff is judge of the county court of county, Wisconsin, and brings this action as such judge, upon the bond hereinafter set forth, at the request and for the use and benefit of M.... N.... and O.... P....

II. Upon information and belief, that on or about the day of, 19.., one J.... K.... then being an inhabitant of the county of aforesaid, died intestate, leaving him surviving his two children and only heirs at law, to-wit, the aforesaid M.... N.... and O.... P....

III. That on or about the day of, 19.., due proceedings in that behalf having been first had, one L.... M.... was appointed by the order of the said county court of county, administrator of the estate of the said J.... K...., and then and there duly qualified as such administra-

tor, and letters of administration upon said estate were thereupon duly issued to him, and he entered upon the discharge of the duties of his said trust. That said J.... K.... died seized of the following described lands, situated in the said county of, to-wit [*describe lands*] and that said lands was all of the property left by the said J.... K.... at the time of his death.

IV. That afterwards, and on or about the day of, 19.., the said L.... M.... as administrator aforesaid, petitioned the said county court for leave to sell said real estate for the purpose of paying debts due and owing from the said estate of said J.... K...., and that upon due proceedings being had the said county court of county, on or about the day of, 19.., made and entered an order granting the prayer of said petition, and licensed the said L.... M.... as administrator aforesaid to sell the said real estate, and required him, the said L.... M.... before making such sale, to take and subscribe an oath as required by law, and to give a bond to the judge of said court in the sum of dollars, with sufficient sureties to be approved by said judge, to account for the proceeds of such sale, and to dispose of the same according to law.

V. That thereupon the said L.... M.... as administrator aforesaid, did take and subscribe such oath, and on or about the day of, 19.., the said L.... M.... as principal, and one W.... X.... and one Y.... Z...., as sureties, did make, execute and deliver to the judge of said county court their bond in the penal sum of dollars, as required by said order, of which bond the following is a copy [*insert copy of bond*].

VI. That said bond, and the sureties thereon, were by the judge of said court thereupon filed and approved, and that thereafter and on or about the day of, 19.., the said L.... M.... as administrator, pursuant to said license, sold said land and received therefor the sum of dollars, and such sale was thereafter duly approved by said county court.

VII. That the said L.... M...., as administrator aforesaid, did not justly and truly account for the proceeds of the sale of such real estate, and did not dispose of the same according to law, and failed to make or file any account of his administration until on or about the day of, 19.., at which time he was cited by the said county court to appear and file his account of the proceeds of the said sale and the property received by him as administrator as aforesaid. That said L.... M.... accordingly filed an account with the said court, to which

objections were thereafter filed by the heirs of said J.... K...., and said matter was thereupon tried by the said court, which court rendered judgment against the said L.... M.... disallowing said account in part and adjudging that the said L.... M.... had failed to account for the sum of dollars, and interest thereon from the day of, 19.., and that he stood charged with said sum and interest, upon his account as aforesaid, which judgment still stands unreversed and unappealed from, and has never been paid.

VIII. That thereafter, on or about the day of, 19.., M.... N.... and O.... P.... applied to the said county court for leave to sue upon the bond of the said L.... M.... hereinbefore set forth, and on the same day the said court granted leave to the said M.... N.... and O.... P.... to sue upon said bond in the name of this plaintiff.

IX. Upon information and belief, that both said W.... X.... and Y.... Z...., died long prior to the commencement of this action, and prior to the said judgment upon said bond. That said W.... X.... died on or about the day of, 19.., then being an inhabitant of the said county of That due proceedings in that behalf having been first had, the said county court of county, on or about the day of, 19.., duly issued letters of administration on the estate of the said W.... X.... to one G.... H...., who thereupon duly qualified as such administrator and entered upon the duties of his office.

X. That said W.... X.... left him surviving the defendants C.... D.... and E.... F...., his children and only heirs at law, and that he died seized and possessed of personal property to the amount and value of dollars, and the owner in fee simple of the following described real estate [*describe the real estate sought to be charged*]. That said W.... X.... had no other property, to the knowledge or information of this plaintiff, and that there were duly proved and allowed by the said county court claims against the estate of the said W.... X.... to the amount of dollars, which claims were fully paid by the said administrator out of the proceeds of the personal property left by the said W.... X...., and exhausted the entire amount of the personal property so left.

XI. That upon the payment of said claims the said G.... H...., as administrator aforesaid, petitioned said court for the final settlement of said estate and to be discharged as administrator, and that such proceedings were thereafter had upon said petition that on or about the day of, 19.., a final decree was entered by the said county court distributing the said real estate to the said defendants C.... D.... and E....

F...., share and share alike, and said estate was then and there adjudged to be finally settled, and the said administrator G.... H.... was discharged. [*It should appear that this discharge took place before the adjudication upon the bond hereinbefore set forth.*]

XII. That the said Y.... Z...., the other surety upon the said bond, died leaving no property, either real or personal, and that this plaintiff has no remedy to recover the amount found due upon the said bond except the remedy which he seeks to enforce in this action. That the said real estate assigned, as aforesaid, to the defendants, was at the time said assignment was made and still is of the value of dollars.

XIII. That prior to the commencement of this action the said M.... N.... and O.... P.... demanded of the said defendants that they pay the amount so adjudged to be due from the said L.... M.... as administrator aforesaid upon said bond, and that said defendants refused to pay the same or any part thereof.

WHEREFORE this plaintiff demands judgment against the said defendants for the sum of dollars, and interest thereon from the day of, 19.., with costs, and that the said sum be adjudged a lien on the real estate so assigned to and held by the said defendants as aforesaid, and that the plaintiff have such other and further relief as may be just and equitable.

1264. Complaint in equitable action by creditor to recover against heirs and charge real estate received by them and set aside conveyances thereof as fraudulent, there having been no administration of the estate of the debtor (adapted from complaint in *Adkins v. Loucks*, 107 Wis. 587 s.c. 83 N. W. 934)

STATE OF
..... Court County.

A.... B....,	}
Plaintiff,	
vs.	
C.... D...., E....	
F.... and G....	
H....,	}
Defendants.	

The plaintiff, complaining of the defendants, alleges:

I. That one L.... M.... [*deceased debtor*] on or about the day of, 19.., for value received, made, executed

and delivered to this plaintiff his promissory note in writing, of which the following is a copy [*insert copy of note*]; that no part of said note has been paid [*except, etc.*], that the plaintiff is still the owner and holder thereof, and that there is now due and owing to him thereon the sum of dollars, with interest from, 19.. [*or otherwise set forth cause of action on contract against deceased, according to the fact*].

II. Upon information and belief, that the said L.... M.... removed from this state to the state of in the month of, 19.., and has never returned to this state but remained a resident of said state of until his death, as hereinafter set forth, and that this plaintiff has been at all times since the execution of said note, and now is, a resident of this state.

III. Upon information and belief, that said L.... M.... died intestate in the said state of in the month of, 19.., and left him surviving the defendants C.... D.... and E.... F.... his children and only heirs at law. That the said L.... M.... left no personal property within this state, but was at the time of his death the owner in fee of the following described real estate situated in the county of in this state, viz. [*insert description*], and that upon the death of the said L.... M.... the title to the said real estate descended in equal shares to the said C.... D.... and E.... F.... and that said real estate was and is of the value of dollars.

IV. That no administration upon the estate of said L.... M.... has been granted or had in this state, and that this plaintiff has been and will be unable with due diligence to collect his said debt, or any part thereof, by proceedings in the county court of said county [*name county where real estate is situated*], or from any personal representatives of said L.... M.... or from any other person except as he may collect the same from the defendants in this action.

V. That on or about the day of, 19.., and before the commencement of this action, the said defendants C.... D.... and E.... F.... well knowing of the plaintiff's said claim against the estate of said L.... M.... and against their interests in said land, and with the fraudulent intent to defeat said claim and prevent the plaintiff from ever recovering the same in any way, executed and delivered to the defendant G.... H.... without consideration [*or state the consideration*] a warranty deed of said real estate, which deed was received by the said G.... H.... with full knowledge of the plaintiff's said claims and with knowledge also of the fraudulent intent of the defendants C.... D.... and E.... F.... in making the same, in which intent the said G.... H.... participated, and that said

G.... H.... still holds the apparent title to said land [*or, if the transfer was merely colorable or accompanied by a secret arrangement to hold the land in trust, set forth the facts as it is expected to prove the same*].

WHEREFORE the plaintiff demands judgment against the said defendants C.... D.... and E.... F.... for the amount due on said note, with costs, to-wit, the sum of dollars, with interest from, 19.., to be apportioned between the said defendants in equal shares; that the said conveyance to said G.... H.... be set aside and declared void; and that the said personal judgments be declared liens upon the interests of the said C.... D.... and G.... H.... in said real estate, and that said real estate be sold to satisfy the same; and for such other and further relief as may be just and equitable.

CHAPTER LXXX.

COMPLAINTS IN ACTIONS IN THE NATURE OF QUO WARRANTO FOR USURPATION OF OFFICE OR CORPORATE FRANCHISE.

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| 1265. Complaint by private person for usurpation of elective local office. | granted to it without authority of law by a city. |
| 1266. The same, for use in jurisdiction where it is not necessary to state the number of legal votes given, nor the specific illegalities claimed. | 1271. Complaint by taxpayer of a village illegally incorporated against the village and its officers, challenging the corporate existence of the supposed village, and praying that the alleged village officers be ousted. |
| 1267. Complaint for usurpation of an office not elective. | |
| 1268. Complaint by private person for usurpation of appointive state office, by one not a citizen. | 1272. Complaint in action by attorney general or state's attorney to forfeit franchises of a street railway company and vacate its charter, because of failure to perform its duties. |
| 1269. Complaint by taxpayer for usurpation of county office by person elected but not eligible. | 1273. Complaint by attorney general or state's attorney to vacate corporate charter for violation of law. |
| 1270. Complaint by property owner against commercial railroad company, challenging its right to exercise franchise to build an elevated road, formally | 1274. Allegation of application to attorney general to commence action, and his refusal. |

The ancient common-law writ of *quo warranto* was a high prerogative writ by which one who had usurped an office, or franchise, or had forfeited it by neglect or misuse was called into court by the king and required to show by what authority he claimed to exercise it. The use of this writ became obsolete so early in the English law that it is impossible now to fix the time, and was succeeded by the criminal information in the nature of *quo warranto*. In most of the American states the terms "*quo warranto*" and "information in the nature of *quo warranto*" are used as synonymous and as referring not to the ancient and obsolete writ but to the information. *State v. West Wisconsin Ry. Co.*, 34 Wis. 211; *State v. Minn. Thresher Co.*, 40 Minn. 213 s.c. 41 N. W. 1020.

Where a constitution or statute confers upon any court the right to use the writ of *quo warranto* it is deemed to refer to

the information in the nature of *quo warranto*. The ancient writ was a civil remedy, brought by the king to oust a usurper or take away a franchise; the information was originally a criminal proceeding to punish the offender by fine, but is now generally regarded as criminal only when brought by the attorney general on his own information, and when brought by private parties in the cases allowed by statute it is regarded as a civil action though it may be brought in the name of the state. *State v. Baker*, 38 Wis. 71.

The constitution of some states grants to courts of general jurisdiction and to the appellate courts expressly or by necessary implication the right to issue the writ, meaning thereby the right to use the remedy by information, and in such states the right can not be taken away by statute. *State v. Baker*, *supra*. Statutory actions by which substantially the same relief may be obtained as by the common-law information have been provided in the following states, and it is to these actions that the forms used in the present chapter are adapted: Wis. Stats. 1898 chapter 149 secs. 3464 *et seq.*; Minn. Rev. Laws 1905 chapter 86; N. Dak. Rev. Codes secs. 5741 *et seq.*; S. Dak. Rev. Codes C. P. chapter 26 secs. 560 *et seq.*; Iowa Code secs. 4313 *et seq.*

The information in the nature of *quo warranto* is preserved by name and its use regulated in Nebraska. *Cobbey's Ann. Stats. of Nebr.* secs. 1706 *et seq.*

In all cases where a statute requires that leave be obtained to bring the action, or that application be first made to a public officer, the fact of the obtaining of such leave or the making of such application and the refusal thereof should be alleged in the complaint or relation.

1265. Complaint by private person for usurpation of elective local office (Wis. Stats. 1898 sec. 3466).

STATE OF WISCONSIN

..... Court County.

The State of Wisconsin, upon
the complaint [*or relation*] of
A.... B....,

Plaintiff,

vs.

C.... D....,

Defendant.

The plaintiff [*or relator*] who brings this action in the name of the state, complaining of the defendant, respectfully alleges:

I. 'That at a general [*or municipal*] election duly called and

held in the county of [or city, or town] pursuant to law, on the day of, 19.., for the election, among other officers, of a [name office], for the term of years from, 19.., there were duly cast [state number, as: two thousand and forty-five (2045)] legal votes for said office for the relator, and [state number] legal votes and no more for the defendant, and that there were no other legal votes cast for said office at said election, and that the relator was thereby duly elected to said office.

II. That notwithstanding the fact that the relator was legally and duly elected to said office as aforesaid, the canvassing board of said county [or city, or town] on the day of, 19.., proceeded to canvass said returns and to make a statement thereof, and erroneously and illegally determined thereby that the said C.... D.... had received legal votes, and the said A.... B.... but legal votes, and unlawfully determined that the said C.... D.... had received the greatest number of votes and was elected to said office of, and thereupon, on said day, unlawfully made out and delivered to said C.... D.... an illegal certificate of election to the effect that said C.... D.... had received the greatest number of votes for said office and was duly elected thereto.

III. That in truth and in fact the said A.... B.... received the greatest number of legal votes cast for said office at said election; that forty-five of the votes so counted for the said C.... D.... were illegally cast by persons not entitled to vote at said election, to-wit:

In the town of [or in the ward] one of the election districts of said county [or city] E...., F.... and G...., whose votes were cast and counted for the defendant were minors under the age of twenty-one years, and X...., Y...., etc., whose votes were so cast and counted were not at the time of casting said votes duly qualified electors, but were persons of foreign birth who were not citizens of the United States or of the State of Wisconsin, and had never been naturalized by their own act or by the act of their parents, and had never declared their intention to become citizens of the United States.

In the town of [or in the said ward], one of the election districts of said county [or city], L...., M...., N...., etc., whose votes were so cast and counted, were not at the time entitled to vote in said election district, as they did not in fact actually reside in said district, and never had resided therein.

[Allege any other illegal votes-cast for defendant, giving

names and grounds of illegality specifically. Wis. Stats. 1898 sec. 3468.]

[If relator has qualified for the office, set forth the facts as follows, although the qualification before action seems not necessary under Wis. Stats. 1898 sec. 3471.]

IV. That on the day of, 19.., the said relator duly qualified as such by taking and subscribing the oath of office as required by the constitution and laws of this state, and filing the same with O.... P.... and by duly executing the official bond, with sureties, in manner, form and substance as required by law, in the sum of dollars.

V. That on the day of, 19.., the said defendant usurped and intruded into the said office of of said county [*or city*], and has ever since unlawfully exercised the same and excluded the relator therefrom, and withheld, and still withholds, the same and the fees and emoluments thereof from him.

WHEREFORE the plaintiff demands judgment that the said C.... D.... be adjudged guilty of usurping, intruding into and unlawfully holding said office, and that he be excluded from the same and the privileges and franchises thereof; that the said A.... B.... be entitled to have, hold and exercise said office, by virtue of said election; that the plaintiff recover the costs of this action.

1266. The same, for use in jurisdictions where it is not necessary to state the number of legal votes given nor the specific illegalities claimed (1 Abbott's Forms, form 697).

I. That on the day of, 19.., at an election duly held in the [*designate the county or district*] of this state, pursuant to the statute, for the election, among other officers, of [*name officer*] for the term of years from the day of, 19.., the said A.... B.... received the greatest number of legal votes [*or the majority, according to the statute*] for the said office, and was duly elected.

II. That on the day of, 19.., the defendant usurped the said office, and has ever since unlawfully exercised the same, and withheld the same from the said [*relator*].

WHEREFORE the plaintiff demands judgment, with costs, that the defendant is not entitled to the said office, and that he be ousted therefrom; that the said [*relator*] is entitled to the office, and to assume the execution of the duties of the same on taking the oath and filing the bond prescribed by law.

1267. Complaint for usurpation of an office not elective (1 Abbott's Forms, form 698).

I. That at the times hereafter mentioned, in the municipal corporation entitled there was, and still is, an executive department created and existing under the laws of this state, known as the street department, the chief officer of which department is called the street commissioner, which office of street commissioner was and is a public office in said city.

II. That in the month of, 19.., one J.... S.... was duly elected to said office for the term of years from the day of, 19.., and on said day entered upon the duties of said office, and discharged the duties thereof until the day of, 19.., when he died, whereby the office became, and thence, until and at the time of the appointment hereinafter referred to, continued vacant.

III. That after said death, and on the day of, 19.., the said [relator] was appointed to said office by the mayor of said city, with the advice and consent of the board of aldermen of said city, and thereafter, and on the same day, in due form of law, and according to the ordinances of the corporation of said city, he gave sufficient security for the performance of his duties as such street commissioner, in the form and amount for that purpose prescribed by the said ordinances, and took and subscribed, before the mayor of said city, and filed his oath in the following form [*copy oath*]. And that he accepted such appointment, and in all respects qualified himself to assume such office, and perform the duties thereof.

IV. That the defendant, claiming to have been appointed by the governor of the state of to fill the aforesaid vacancy, created by the death of said J.... S.... and without any other or any legal warrant, right, or grant whatever, intruded into and usurped said office, and still unlawfully holds and exercises the same.

[*Conclude as in last preceding form.*]

1268. Complaint by private person for usurpation of appointive state office, by one not a citizen (from State v. McDonald, 108 Wis. 8 s.c. 84 N. W. 171).

[*Title.*]

The relator above named, who brings this action in the name of the state of Wisconsin, complains and alleges:

I. That in the month of April in the year 19.., said A.... B.... was duly appointed by the governor of Wisconsin to the office of for the district of Wisconsin, and during the same month, in pursuance of appointment aforesaid, duly

qualified as such officer and continued to occupy and exercise said office up to and including the month of, 19.., and has always been and now is entitled to said office.

II. That in the month of, 19.., and as affiant is informed and believes, on the day of, 19.., the defendant C.... D.... was appointed to said office by the governor of said state of Wisconsin, and on or about the day of, 19.., attempted to qualify therein.

III. That at the time of his said appointment, said C.... D.... was not a citizen of the state of Wisconsin. That up to the day of, 19.., he was a subject of the queen of Great Britain. That on said last named date said C.... D.... completed his naturalization as a citizen of the United States in the district court of county, Minnesota, at which time he renounced his allegiance to the queen of Great Britain and was declared and adjudged by said district court of county, Minnesota, to be a citizen of the United States. That thereafter, said defendant continued to be, and as complainant is informed and believes is now and was at the time of his said appointment to said office, a citizen of the state of Minnesota. That a few days before his said appointment—the exact number of days is unknown to the complainant, but as said complainant is informed and believes, in the month of, 19..,—said defendant became a candidate for said office then held and exercised by the complainant. That said defendant, knowing that it was necessary under the laws of the state of Wisconsin to be a citizen of Wisconsin in order to be eligible to said office, immediately thereafter pretended to take up a residence in the city of, in county, Wisconsin. That before said time said defendant was a resident and citizen of the state of Minnesota. That said action of defendant was solely and wholly to obtain said office. That said defendant at the time he pretended to take up said residence in Wisconsin and up to the time of his appointment, had no intention of taking up a permanent residence in said state of Wisconsin, or of becoming a citizen of said state of Wisconsin, nor at the time of his said appointment did said defendant have any intention of permanently residing in said state or of being a citizen of said state. That at the time said defendant took up said pretended residence in the state of Wisconsin as aforesaid, during the time of his said pretended residence in Wisconsin, and up to the time of his appointment to said office, said defendant intended to leave the state of Wisconsin and return to the state of Minnesota, in case he should be unsuccessful in his candidacy for said office. That said action of defendant in so moving into Wisconsin was a mere subterfuge and makeshift to

bring him apparently within the requirements of the law as to citizenship in order to hold said office.

IV. That on or about the day of, 19.., and after said defendant had attempted to qualify in said office, said complainant, A.... B...., delivered to defendant most of the books and effects pertaining to said office and yielded to said defendant's supposed incumbency of said office. That at the time when the complainant so delivered said books and effects, and so yielded to said defendant, complainant did not know of defendant's disqualification for said office, and did not know the facts hereinbefore set forth pertaining to defendant's residence or citizenship, nor any of said facts, but complainant supposed said defendant to be a citizen of Wisconsin at the time of his said appointment and supposed him to be eligible to said office.

V. That defendant unlawfully usurped said office on or about the day of, 19.., and has ever since continued to unlawfully usurp said office, and now unlawfully usurps said office and exercises the same, and has since the day of, 19.., withheld and still withholds the same, and the fees and emoluments thereof, from complainant. That complainant has demanded of defendant that he surrender up said office and the books and effects of said office to complainant, all of which defendant has refused and still refuses to do.

VI. That complainant has informed the attorney general of Wisconsin of the foregoing facts and demanded that he bring an action in the name of the state of Wisconsin to oust said C.... D.... from said office, but said attorney general refused and still refuses to act.

WHEREFORE complainant demands judgment against said defendant C.... D....; that said defendant C.... D.... be adjudged guilty of usurping, intruding into and unlawfully holding said office, and that he be excluded from the same and the privileges of the same; that said A.... B.... be entitled to have, hold and exercise said office and to the fees, emoluments and privileges thereof; that said A.... B.... recover the costs of this action against said C.... D....; and for all further and other relief as the court may deem just.

1269. Complaint by taxpayer for usurpation of county office by person elected but not eligible (from complaint in Fordyce v. State, 115 Wis. 608 s.c. 92 N. W. 430).

[Title of cause.]

The above named relator brings this action in the name of the state of Wisconsin against the above named defendant, and for a complaint in this action alleges:

I. That the relator now is and for more than two years prior

to the commencement of this action, including all the times hereinafter mentioned, has been a resident, freeholder, taxpayer and duly qualified elector and voter in county, Wisconsin, and now resides, and during all of said times resided in the city of in said county, and now is and during all of said times has been a citizen of the United States and of the state of Wisconsin.

II. That on the day of November, 19.., at a general election held in and for said county of pursuant to law, for the election, among other officers, of a county superintendent of schools of said county, for the term of two years from the day of, 19.., the said defendant received the greatest number of votes cast for said office, and that thereafter the canvassing board of said county proceeded to canvass the returns of said election from the various towns, wards, villages and election districts, and determined that said defendant was elected to the said office of county superintendent, and thereupon issued a certificate of election to the effect that the defendant received the greatest number of votes for said office, and was elected to said office; the said certificate of election was delivered to said defendant, and thereafter and on the first Monday of, 19.., the said defendant attempted to qualify as such county superintendent, by taking and subscribing the oath of office in the form required by law, and filing the same with the county clerk, and executed her official bond in the form required by law, and in the amount and with the sureties required by the county board of said county, and filed the same in the manner required by law.

III. That said defendant is not and never has been eligible to the office of county superintendent of schools, and was not eligible to said office at the time of her election; that she did not at said time nor at any other time hold a certificate entitling her to teach in any of the public schools in said state; that she did not at said time, nor at any other time, ever hold a county superintendent's certificate issued by the state superintendent after examination by and upon the recommendation of the board of examiners for state certificates, as required by law, and did not at that time, nor at any other time ever hold any county superintendent's certificate of any kind whatever; that she had never held the office of county superintendent of schools on or prior to the first day of May, 19..

IV. That the name of said defendant was illegally placed upon the official ballot of said county, as a candidate for the office of county superintendent of schools of said county at said election; that the defendant failed and neglected to file in the office of the county clerk of said county, ten days before the day

of said election, or at any other time whatever, any proof whatever of having taught in any of the public schools of this state, or any copy of a certificate entitling her to teach in any of such schools, or any certificate known as a county superintendent's certificate, or any proof that she held the office of county superintendent of schools in this state on or before the day of , 19. . . , that said defendant failed and neglected to file in the office of the county clerk of said county any proof whatever that she held any certificate entitling her to teach in any of the schools in this state, or any copy of any such certificate, or any county superintendent's certificate, or any copy of any such certificate, or any proof whatever showing that she was entitled to hold said office, or was eligible thereto.

V. That on said first Monday of , 19. . . , the defendant usurped and intruded into the said office of county superintendent of said county and has ever since unlawfully exercised the said office, and still holds the same with the fees and emoluments thereof, and threatens to, and will unless restrained by the court, collect, hold and receive the fees and emoluments of said office.

WHEREFORE the state, upon the complaint of the said relator, demands judgment against said defendant that the said defendant be adjudged guilty of usurpation, intruding into and unlawfully holding said office, and that she be excluded from the same, and from the privileges and franchises thereof; that she be required to return to the county all fees and moneys which she has, or may receive during the pendency of this action, by virtue of said office and that the relator recover his costs in this action, together with such other and further relief as may be proper.

1270. Complaint by property owner against commercial railroad company, challenging its right to exercise franchise to build an elevated road, formally granted to it without authority of law by a city.

[*Title of cause.*]

The relator, who brings this action in the name of the state, complaining of the defendant, respectfully alleges:

I. That the defendant is a railroad corporation organized and incorporated under and by virtue of section of the statutes of 19. . . , and that a copy of its articles of organization is hereunto annexed and made part hereof, marked Exhibit A.

II. That the relator is a resident in and taxpayer in the city of , county of in the said state of and is the owner of a certain parcel of land upon street, in said city, described as follows [*insert description.*]

III. That by reason of the enactment of the ordinance hereinafter named, and the holding by the defendant of the franchises therein attempted to be conferred, plaintiff's said real estate was greatly diminished in value, and that the construction of the elevated railway hereinafter described will necessarily result in further great damage to the value of said real state and to said relator.

IV. Upon information and belief, that on or about the day of, 19.., the said defendant made application to the mayor and common council of the city of in words and figures as follows [*insert copy of application for ordinance*]; that annexed to said application was a copy of a proposed ordinance granting to said defendant the right and authority to construct, maintain and operate an elevated railroad with two tracks, and such curves, spurs, side-tracks, switches, stations and platforms as said railway company, its successors or assigns might deem necessary for operating its said railroad along and upon the streets in said proposed ordinance named, and that thereafter, upon said application, the said ordinance was brought before the common council of the city of pursuant to a notice of application therefor duly published according to law, and such proceedings were had thereon by the said common council that upon the day of, 19.., said common council duly passed said ordinance, and the same was approved by the mayor of said city, and that a true copy thereof is hereto attached and made part hereof, marked Exhibit B.

V. That after the passage, approval, and publication of said ordinance as aforesaid, the said defendant filed with the said city clerk of said city of his written acceptance of the said ordinance under seal, and that said defendant now holds the said franchises granted or attempted to be granted by said ordinance, and exercises the said franchises, by proceeding to act thereunder and by said written acceptance.

VI. That the lands of the plaintiff hereinbefore set forth front and abut upon street in the said city of for a distance of feet, and that the elevated railroad proposed to be built under said ordinance by the said defendant runs upon and along the said street, and in front of and upon the said premises of the relator for the said distance of feet, and that the defendant claims the right under and by virtue of said ordinance, and the franchises thereby attempted to be granted, to build, maintain and operate the said elevated railroad upon said street, and in front of and upon the relator's said real estate.

VII. Upon information and belief, that said defendant has

no power or authority under its charter or under the laws of the state of to construct, maintain, or operate said elevated railroad in said ordinance described or any similar elevated railroad upon said street, or upon any of the streets of the said city of, and that said defendant has no power or authority to accept, hold, or exercise the franchises attempted to be created by the said ordinance, and that the said common council of the said city of has no right, power, or authority to confer upon the defendant the rights, privileges and franchises granted in said ordinance.

VIII. That heretofore, on or about the day of, 19.., the relator applied, upon verified petition, to the attorney general of the state of to bring action in the name of the state of against the said defendant for the purpose of requiring the said defendant to show cause by what authority it attempts to hold and exercise said franchises, but that the said attorney general upon the date last aforesaid refused to act in said matter, and declined to bring the said action.

IX. That the relator thereafter executed and filed with said attorney general a bond running to the state of, conditioned for the payment of all costs and disbursements which might be adjudged against the relator in this action, which bond was sufficient for said purpose in form and sureties, and was approved by said attorney general.

WHEREFORE plaintiff demands judgment that said defendant be required to show cause by what authority it holds and exercises the franchises attempted to be granted by said ordinance, and that in default of such showing said defendant be adjudged guilty of unlawfully holding said franchises or privileges, and be excluded from the same, and be adjudged to pay a fine, together with the costs and disbursements of this action; and that the plaintiff have such other and further order, judgment, or relief as may be equitable.

1271. Complaint by taxpayer of a village illegally incorporated against the village and its officers, challenging the corporate existence of the supposed village, and praying that the alleged village officers be ousted (adapted from complaint in *State v. Leischer*, 117 Wis. 475 s.c. 94 N. W. 299).

I. That the defendant [*name alleged village*] is a pretended village or municipal corporation, in the county of in said state, attempted to be organized under the laws of the state of

....., but never in fact legally organized or existing,¹ and that the defendants C.... D.... [etc., naming acting officers], now claim to and do in fact exercise authority as officers of said pretended village, and are exercising authority as such village officers, levying taxes, taking charge of highways, and otherwise usurping full power and authority as such village officers within the territory hereinafter described.

II. That the relator is a resident within the limits of said alleged village, and owns real estate and is a taxpayer within the said territory over which the said last named defendants are wrongfully exercising the powers of village officers as aforesaid.

III. That [here set forth the steps taken to incorporate the said supposed village, and allege specifically the defects in the proceedings which render the attempted incorporation void, if the defect be that there were illegal votes cast at the election called to decide the question, the number of votes cast for and against the proposition should be specifically stated, and the alleged illegal votes named, and the grounds of illegality set forth as in the first form in this chapter].

IV. That at a pretended election held in said pretended village on the day of, 19.., the said defendants C.... D.... [etc., naming defendants], were in form elected officers of said village, to-wit: C.... D...., president; E.... F...., clerk [name defendants and their respective offices]; and that each and all of said defendants thereafter in form qualified for their respective offices, and thereafter assumed and now assume to discharge the duties of village officers in said territory, and unlawfully usurp the power and authority to act as such officers; and that said defendants have and claim no other right or authority to act as such officers, nor has such pretended village any right or authority to exist as a village other than the right attempted to be conferred and acquired by the proceedings hereinbefore set forth.

V. That the relator, on the day of, 19.., and before the commencement of this action, made due application to the attorney general of the state of to commence an action of *quo warranto* against said pretended village and said pretended officers, but that said attorney general refused and still refuses so to do.

WHEREFORE plaintiff demands judgment that said pretended village of be adjudged an unlawful usurpation of

¹ The *de facto* village is a necessary party to the action, notwithstanding it may have no legal ex-

istence. State v. Leischer, 117 Wis. 475 s.c. 94 N. W. 299.

village government; that said defendants C.... D...., etc., be adjudged to have unlawfully usurped their said pretended offices, and that they be ousted therefrom; and that plaintiff have such other judgment or relief as may be just, and for costs.

1272. Complaint in action by attorney general or state's attorney to forfeit franchises of a street railway company and vacate its charter, because of failure to perform its duties (adapted from State v. Madison S. R. Co., 72 Wis. 612 s.c. 40 N. W. 487).²

STATE OF.....
..... Court, ... County.

State of on relation of
A.... B...., Attorney Gen-
eral of said State [*or* State's
Attorney for county],
Plaintiff,

vs.

C.... D.... Street Railway
Company,
Defendant.

The complaint of the state of on the relation of A.... B...., respectfully shows and alleges:

I. That the defendant, the C.... D.... Street Railway company, is a corporation duly created and existing under the laws of said state, and that it was organized for the purpose of constructing and operating a street railway in the city of in said state, and that it has its principal office and place of business in said city of

II. That on the day of, 19.., the relator duly made application to the court of for leave to bring this action, in and by a duly verified petition signed by himself [*or* by E.... F....] and that on the day of, 19.., the said court by order duly entered, granted leave to the said attorney general [*or* state's attorney] to bring this action, and that satisfactory security has been given by bond, with sufficient sureties, duly executed and delivered, to indemnify the said state against all costs and expenses to be incurred in this action, and that this action is one of public interest.

² Leave to bring this action must first be obtained. Wis. Stats. 1898 sec. 3241; N. Dak. Rev. Codes sec. 5777; S. Dak. Rev. Codes C. P. sec. 571. The fact that leave has been obtained should be alleged in the complaint. See Form 91.

III. That on or about the day of, 19.., in and by an ordinance of the said city of entitled "An Ordinance Conferring Certain Rights and Privileges upon the C.... D.... Street Railway Company," authority and permission was granted to the said C.... D.... street railway company, to lay and maintain a single or double track street railway on certain streets of said city, and operate street cars thereon by electric power, with all necessary switches, curves, turn-outs and other appliances and conveniences, on the express condition that the said C.... D.... street railway company should construct and have in operation one line of the said railway extending from to on or before the day of, 19.., and should thereafter at all times during the continuance of the rights granted by said ordinance maintain and operate the same; that said franchise was limited by said ordinance to a period of twenty-five years from the date of the passage thereof; and it was further conditioned that if said railway company failed or neglected to construct and complete, and thereafter operate the said lines of railway over the routes and within the time in said ordinance provided, then said company should forfeit all rights, privileges and franchises in said ordinance granted, and the same should become null and void and of no effect, and that said railway company, as a condition of accepting the rights and authority thereby granted, agreed to construct the said railway in a good and substantial manner, and in accordance with the approved plans for the construction of such railway, and further agreed [*here insert any further conditions contained in the ordinance with regard to the building of the road, its maintenance, and the duties of the street railway company which are claimed to have been violated*].

IV. That it was further enacted in and by said ordinance that the same should be null and void, and that all rights granted thereby should cease and be of no effect unless said company should file a written acceptance of the same with the clerk of said city within sixty days after the passage thereof; that said ordinance was passed by the common council of the said city of on the day of, 19.., and duly signed by the mayor of said city on the day of, 19.., and that the said C.... D.... street railway company thereafter accepted the privileges and franchise granted in said ordinance, by filing with the clerk of said city its written acceptance thereof on the day of, 19....

V. That the said C.... D.... street railway company, by virtue of the rights and privileges granted by said ordinance, thereafter constructed a street railway track beginning at [name

and describe the track constructed] and that the said C.... D.... street railway company thereafter commenced to operate the said street railway track by the running of cars thereon, but that said street railway company wholly failed and neglected to comply with the conditions and provisions of said ordinance, in the following respects, to-wit, that the said company has wholly failed and neglected to grade the streets between the rails of its said track, so as to restore said portions of the streets to the proper condition of repair and to such a state of usefulness as to make said streets as serviceable and useful as is needed for the ordinary public use of the same; that the said defendant has wholly failed and neglected [*here set forth particularly all breaches of the ordinance which are relied upon as grounds for vacating the franchise*].

WHEREFORE judgment is demanded against said defendant that it may be adjudged to have forfeited, lost and surrendered all rights and privileges granted to it by the said ordinance, and all its corporate rights, privileges and franchises, and that by the judgment of this court it be excluded from the exercise of said rights, franchises, corporate rights, and privileges, and that it be dissolved and its affairs wound up; that its property be sold and converted into money; that a receiver be appointed for the purpose of closing up the affairs of said corporation, and its property be applied to the payment of its debts and liabilities, together with the costs of this action, and that such further or other judgment be rendered as may be just and equitable.

G.... H...., Attorney General.

[*Verification.*] [or, State's Attorney of County.]

1273. Complaint by attorney general or state's attorney to vacate corporate charter for violation of law.³

I. [*As in last preceding form.*]

II. [*Allege obtaining of leave to sue, as in last preceding form.*]

III. That said corporation, for the space of months past has exercised, without any warrant, charter or grant, the franchise of banking, and has issued notes, received deposits, made discounts, and transacted other banking business to which it was not authorized, and has exercised franchises not conferred upon it by law. [*Or allege violation of its charter or of law, according to the fact.*]

³ Wis. Stats. 1898 sec. 3240 *et seq.*; S. Dak Rev. Codes C. P. sec. 571 *et seq.*; Minn. Rev. Laws 1905 chap. 571 *et seq.*; Cobbey's Ann. Stats. 86; Iowa Code sec. 4313 *et seq.*; of Nebr. sec. 1707 *et seq.* N. Dak. Rev. Codes sec. 5775 *et*

WHEREFORE the plaintiff demands judgment, that the defendant [*corporation*] be excluded from all corporate rights, privileges, and franchises, and that the charter of said corporation be annulled and vacated; and for the costs of this action.

1274. Allegation of application to attorney general to commence action, and his refusal.

[To be inserted where action is brought on relation of private person, and the statute requires that application be first made to the attorney general or state's attorney.]

That on or about the day of, 19.., and before the commencement of this action, the relator [*or plaintiff*], made application in writing to the attorney general of the said state of [*or, to the state's attorney for the county of*] that he commence an action in the nature of an action of quo warranto against the said for the purpose of punishing the said usurpation of office on the part of the said C.... D.... [*or for the purpose of vacating the corporate charter of the defendant, or otherwise state the purpose of the action*], but that the said attorney general refused and still refuses to commence said action.

CHAPTER LXXXI.

COMPLAINTS IN VARIOUS ACTIONS AUTHORIZED BY STATUTE.

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| <p>1275. Complaint for statutory forfeiture.</p> <p>1276. Complaint or affidavit by deputy game warden for violation of game law in action for forfeiture before justice of the peace (Wisconsin).</p> <p>1277. Allegation of a foreign statute imposing the liability sued on.</p> <p>1278. Complaint by wife against saloonkeeper for damages resulting from sale of liquors to husband, an habitual drunkard.</p> <p>1279. Complaint in the name of the state upon saloonkeeper's bond, when damages have been recovered in previous action against saloonkeeper.</p> <p>1280. Complaint by wife against one who sold liquor to</p> | <p>husband causing his intoxication and resulting damage to the wife.</p> <p>1281. Complaint by married woman on saloonkeeper's bond.</p> <p>1282. Complaint by minors on bonds of several saloonkeepers.</p> <p>1283. Complaint for damages against a witness for disobeying a subpoena.</p> <p>1284. Complaint to recover a forfeiture for violation of a city ordinance.</p> <p>1285. Complaint against a railroad corporation for exacting an illegal rate of fare.</p> <p>1285a. Complaint by state against member of board of review to recover forfeiture for intentional omission of property from tax roll.</p> |
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In Wisconsin a penalty or forfeiture for an act not a misdemeanor is to be recovered in a civil action brought in the name of the state, or in case any portion of the forfeiture is payable to a person such person may join as plaintiff with the state. Wis. Stats. 1898, secs. 3294, 3295-3297. It is sufficient to allege in the complaint that the defendant is indebted to the plaintiff in the amount of the forfeiture according to the provisions of the statute, naming section and chapter. Id. sec. 3295. A forfeiture for violating a municipal ordinance is to be sued for by the municipality in its own name. Id. sec. 3303. In Minnesota the action is civil and to be prosecuted by the officers or persons to whom they are by law given, or who are especially authorized to recover them. Minn. Rev. Laws 1905 sec. 4540. In Iowa the action is to be prosecuted by the officer or person to whom the forfeiture by law belongs in whole or in part, or the officer to whom it is to be paid when collected. Iowa Code secs. 4338, 4339.

In North Dakota a penalty or forfeiture for an act not a misdemeanor is to be sued for in a civil action brought by the attorney general or state's attorney in the name of the state if the entire sum is payable to the state; by the proper public corporation if it is payable to such corporation, and if payable in part to the state and in part to an individual, then by either party or by both jointly. N. Dak. Rev. Codes secs. 5785, 5786. The same provision as to the allegations of the complaint is made as in Wisconsin. Id. sec. 5787.

In stating the facts of a case under a statute, care must be taken to make a case clearly within the statute; and this may generally be best done by pursuing the words of the statute, adding such particulars of time, place, and value as may be necessary to give definiteness and certainty to the claim; although, where the plaintiff is a stranger to the transactions, and defendant may be presumed cognizant of them, generality of statement is permitted.

It is not necessary to aver a *scienter* in the violation, unless the statute gives the action only for a knowing violation.

A distinct proviso, whether in the same section or another, furnishing mere matter of excuse for the defendant, need not be negatived; but, generally, an exception incorporated in the very clause should be negatived. The true test, under the code, is this: if the burden of proof is on the plaintiff the matter should be alleged. If it is matter of defense, to be established by the defendant in order to make the exception or proviso avail him, the plaintiff need not notice it.

Numerous violations of a single provision,—e. g., a single subdivision of the section of the statute,—may be alleged in one count. But there should be a separate count for violations of a distinct subdivision.

1275. Complaint for statutory forfeiture (general form).

I. That on the day of, 19.., at the defendant [*here state acts constituting a violation of the statute, either following the words of the statute, or setting forth the facts more specifically*].

II. That thereby the defendant became indebted in the amount of [*the penalty or forfeiture*] to the [*one for whose use the same is given*]; whereby an action accrues according to the provisions of [*stating the title or the subject-matter of the statute, and naming the section, title, and chapter which imposes the penalty*].

[*Demand for judgment.*]

1276. Complaint or affidavit by deputy game warden for violation of game law in action for forfeiture before justice of the peace (Wisconsin).¹

[*Title.*]

[*Venue.*]

L.... M...., being duly sworn and examined by and before O.... P...., a justice of the peace in and for said county, says that he is a deputy of the state fish and game warden of said state [and makes this complaint on behalf of said state] and for complaint herein says that A.... B.... heretofore, to-wit, on the day of, 19.., at county, in said state of Wisconsin, incurred a forfeiture of dollars, according to the provisions of section of chapter of the laws of said state for the year 19.., by then and there offering for transportation to a common carrier and transporting unlawfully two or more packages of fish caught in the inland waters of the state of Wisconsin, to-wit, pike taken from Lake Winnebago in said state, to a point outside of the state of Wisconsin, the same being in more than twenty pound packages; and the said A.... B.... is now indebted to the State of Wisconsin in the sum of dollars forfeiture for the violation of the section last designated.

WHEREFORE the complainant demands that a civil warrant be issued for the body of the said A.... B...., and that he be arrested and dealt with according to law and held to answer to the said state of Wisconsin therefor.

Dated, 19..

L.... M....

Subscribed and sworn to before
me this day of, 19..

O....P....,
Justice of the Peace.

1277. Allegation of a foreign statute imposing the liability sued on.

I. That by section of Chapter of the laws of the state of passed, 19.., which chapter is entitled

¹ This form is sustained in State v. Nergaard, 124 Wis. 414, under sec. 3602 Wis. Stats. 1898. This was civil action before a justice of the peace to recover a forfeiture to the state imposed by the fish and game law of the state. The words in brackets were not in the precedent, and held to be unneces-

sary because the statute directly authorized the complaint to be made by a deputy warden. It was intimated however, that in case such a complaint were made by a private citizen it should appear on the face that it was made on behalf of the state.

“An Act, etc,” it is provided as follows [*insert such provisions of the law as impose the liability sued on*].

II. That the said law has been at all times since its passage, and now is, in full force and effect, and [*if it has been construed and the fact of such construction is essential*], that the highest court of appellate jurisdiction in said state, to-wit, the court, in the action of O.... P.... v. X.... Y...., brought before said court and reported in the volume of the reports of said state at page decided and still holds [*state the construction*].

III. [*Set forth the cause of action as suggested by forms in this chapter.*]

1278. Complaint by wife against saloonkeeper for damages resulting from sale of liquors to husband, an habitual drunkard (Wis. Stats. 1898 secs. 1554 and 1560).

I. That the plaintiff is, and since the day of, 19.., has been the wife of one E.... F...., and that the said E.... F.... became and was, prior to the day of, 19.., an habitual drunkard, so that by the excessive drinking of intoxicating liquors the said E.... F.... did misspend, waste, and lessen his estate so as to expose his family to want and injure his health and endanger the personal safety and comfort of this plaintiff.

II. That from the day of, 19.., up to the time of the commencement of this action the defendant has been a saloon keeper within the town [*or city*] of duly licensed under the laws of this state to keep a saloon within said town [*or city*] for the sale of strong, spirituous, malt, ardent, or intoxicating liquors.

III. That on the day of, 19.., the supervisors of the town of in said county of [*or, the aldermen of the city of*] being the town [*or city*] wherein the said E.... F.... then resided [*or, this plaintiff*] did, by a notice in writing signed by them [*or by her*] and served upon the defendant on that day, forbid the defendant and all other persons in said town [*or city*] licensed in accordance with the laws of this state to sell or give away to said E.... F.... any ardent, spirituous, or intoxicating liquors or drinks for the space of one year from said last named date.

IV. That after the giving of such notice to the defendant, and notwithstanding the same, and on or about the day of, 19.., and at various times thereafter and prior to the expiration of one year from the giving of such notice, the defendant did knowingly sell and give away to the said E.... F.... intoxicating liquors and drinks, thereby causing the in-

toxication of the said E.... F...., which intoxication so caused became and was continuous [*or* very frequent] during the said last named period, whereby the said E.... F.... wasted and misspent his property and became sick and incapacitated from labor, and unable to support his family, and the plaintiff was reduced to poverty.

V. That the plaintiff was and is entirely dependent upon the said E.... F.... for her support; that the said E.... F.... was capable of earning and did earn large sums of money when not intoxicated, to-wit, about the sum of dollars per week, which he applied to the support of this plaintiff; that by reason of his intoxication, so caused by the defendant, his health has been ruined, his property wasted, and he has neither earned nor contributed anything to plaintiff's support, and the personal safety and comfort of this plaintiff has been destroyed and she has been reduced to a state of permanent sickness and ill-health, in all to her damage in the sum of dollars.

[*Or:* V. That theretofore the said E.... F.... had been and was industrious and healthy, and was earning dollars per month in his business as a carpenter and had provided for plaintiff and their said family a comfortable support; that upon the earnings of her said husband plaintiff was dependent for her means of support.]

VI. That in consequence of said continuous intoxication so caused by said defendant, said E.... F.... neglected his said business and failed to properly care for and provide a subsistence for plaintiff and their said family, and became frequently disabled and sick, and plaintiff was compelled to nurse and take care of him, and he became and was unable to provide a proper support for his said family, whereby the plaintiff has suffered damage in the sum of dollars.

WHEREFORE plaintiff demands judgment against the defendant for the sum of dollars, with the costs of this action.

1279. Complaint in the name of the state upon saloonkeeper's bond, when damages have been recovered in previous action against saloonkeeper (Wis. Stats. 1898 sec. 1549).²

I. That the defendant C.... D.... on or about the day of, 19.., duly made application to the town board [*or* city council] of the town [*or* city] of in the county

²In Wisconsin the action for damages is to be brought against the saloonkeeper alone, and after judgment is obtained in that action, if the same be not paid, ac-

tion may be brought upon the bond in the name of the state to recover the full penalty of the bond. Wis. Stats. 1898 secs. 1560 and 1549.

of for a license to keep a saloon in said town [*or city*] for the sale of strong, spirituous, malt, ardent, or intoxicating liquors under the provisions of the statutes of the state of Wisconsin within said town [*or city*] and that upon the same day the said defendant C.... D.... as principal, and the defendants W.... X.... and Y.... Z.... as sureties, executed and filed with the clerk of said town [*or city*] their certain bond, which was approved by said town board [*or city council*], conditioned as required by section 1549 of the Statutes of said state of Wisconsin for the year 1898, a copy of which bond is attached hereto, made part of this complaint, and marked Exhibit A. That thereafter, and on or about the day of, 19.., the said C.... D.... paid the license fee required by law, and the said town board granted and delivered to the said defendant C.... D.... its license in due form, licensing the said C.... D.... to keep a saloon for the sale of such liquors, at in said town [*or city*] until the day of, 19.., unless sooner revoked.

II. That after the issuance of said license, as aforesaid, the said C.... D.... kept and maintained said saloon and sold spirituous, malt, and intoxicating liquors therein during the term of said license, and that on or about the day of, 19.., one A.... B.... brought action against the said C.... D.... in the court of county, for damages resulting to her from the unlawful sale of intoxicating liquors by him during the term of said license, to one E.... F.... in violation of the provisions of section 1554 of said Wisconsin Statutes, the said E.... F.... being a person to whom the sale of such liquors had been duly forbidden under the provisions of said last named section.

III. That such proceedings were thereafter had in said action that judgment was, on the day of, 19.., duly rendered by said court in said action in favor of said A.... B.... and against said C.... D.... for the sum of dollars damages and costs, which judgment has never been paid and is in full force, unappealed from and unreversed.

WHEREFORE the plaintiff demands judgment against said defendants for the sum of dollars, the penalty of said bond, and for the costs of this action.

1280. Complaint by wife against one who sold liquor to husband causing his intoxication and resulting damage to the wife (Iowa Code sec. 2418).

I. That the plaintiff is now, and ever since the day of, 19.., has been the wife of one E.... F...., and was

and is dependent upon him, the said E.... F.... for her support.

II. That on or about the day of, 19.., and at various times between that date and the day of, 19.., the defendant did wilfully sell and give to the said E.... F.... intoxicating liquors, of which the said E.... F.... drank and became intoxicated, and thereby became an habitual drunkard.

III. That while so intoxicated, as aforesaid, the said E.... F.... spent his time in idleness and failed to support this plaintiff; that on the day of, 19.., while so intoxicated by intoxicating liquors so sold and furnished to him by the defendant the said E.... F.... by reason of such intoxication assaulted and beat the plaintiff and dislocated her arm, and caused her great pain and suffering in body and mind, to her damage in the sum of dollars.

WHEREFORE, etc.

1281. Complaint by married woman on saloonkeeper's bond (S. Dak. Rev. Codes P. C. secs. 2839-2849).³

I. [*Allege the procurement of a license and the giving of the bond in suit with particularity, so that it clearly appears that all the provisions of the law of South Dakota were complied with; see, by way of example, the first allegation in Form 1279.*]

II. [*Allege the relationship of the plaintiff to the person to whom liquor was unlawfully sold, as in Form 1278.*]

III. [*If the liquors were sold to a forbidden person, allege the giving of the notice substantially as in Form 1278, with such changes as are necessary to conform to S. Dak. Rev. Codes P. C. sec. 2839.*]

IV. [*Allege damages, and demand judgment, as in Form 1278.*]

1282. Complaint by minors on bonds of several saloonkeepers (Cobbey's Ann. Stats. of Nebr. secs. 7155-7165).⁴

I. [*Allege infancy of plaintiff and appointment of a guardian ad litem or next friend, as in Form 554.*]

* It is held in South Dakota that this action may be maintained by a divorced wife, for damages accruing to herself and children before the divorce. *Nordin v. Kjos*, 13 S. Dak. 497. See that case for allegations of a complaint by di-

vorced wife which was there sustained.

⁴ Adapted from complaint in the case of *Bloedel v. Zimmerman*, et al., 41 Nebr. 699 s.c. 60 N. W. 6, where the right of minor children to maintain the action for loss of support was maintained.

II. [*Allege giving of bonds by the various defendants, and issuance of licenses according to the laws of Nebraska in detail; see, for example, the first allegation in Form 1279.*]

III. That each of the said defendants on or about the day of, 19.., and at numerous times between that time and the date of the commencement of this action and during the continuance of their said licenses, did sell and give to one E.... F.... the father of these plaintiffs, malt, spirituous, and vinous liquors in large quantities, and that the said E.... F.... drank the said liquors so sold and given to him, and thereby and by the excessive use of said liquors became an habitual drunkard.

IV. That the said plaintiffs had at the times aforesaid and still have no means of support except the support furnished them by their said father; that prior to the year 19.. the said E.... F.... was temperate and industrious, and supported these plaintiffs by means of his earnings as a carpenter, but that by reason of the furnishing of said liquors, as aforesaid, the said E.... F.... neglected his business, spent his time in idleness, and ceased to earn any wages, and became an habitual drunkard, and failed entirely to support these plaintiffs, whereby the plaintiffs suffered damage in the sum of dollars.

WHEREFORE [*demand judgment.*]

1283. Complaint for damages against a witness for disobeying a subpoena.⁵

I. That on the day of, 19.., at the plaintiff caused the defendant to be duly served with a subpoena commanding him to attend as a witness in the court, in and for the county of [*or, to attend as a witness before M.... N...., an officer of the court, duly empowered to receive evidence, or, to attend as a witness before M....*

⁵ Civil damages may be recovered of a material witness who when duly subpoenaed and his fees paid or tendered, wilfully fails to attend. Wis. Stats. 1898 sec. 4063; Minn. Rev. Laws 1905 sec. 4657; S. Dak. Rev. Codes C. P. sec. 495; Cobbey's Ann. Stats. of Nebr. sec. 1910. In North Dakota a witness subpoenaed by defendant in a criminal action is liable in a civil action in the sum of fifty dollars, unless he shows good cause for his non-attendance. N. Dak. Rev. Codes sec. 8371. In such action the foregoing form may be sub-

stantially used, substituting for the allegations of damage the statement that by reason of such disobedience of the subpoena the defendant became indebted to the plaintiff, according to the provisions of sec. 8371 of the Revised Codes of North Dakota, in the sum of fifty dollars. In Iowa such defaulting witness is civilly liable to the party who has subpoenaed him for all consequences of his delinquency, with fifty dollars additional damages. Iowa Code secs. 4663 and 4664.

N...., a commissioner appointed by the court, to take testimony, *or*, to attend as a witness before M.... N...., a referee duly appointed by the court, to—*briefly designating object of reference*], on the day of, 19.., there to give testimony in behalf of the plaintiff in proceedings there pending, wherein this plaintiff was the plaintiff, and one O.... P.... was defendant [*or otherwise briefly designate the proceedings*] and that the said defendant was a material witness upon the issues raised in said action [*or proceedings*].

II. That at the same time the plaintiff caused cents, the lawful fees of the said witness for one day's attendance and his mileage, to-wit, the sum of cents to be paid [*or tendered*] to him.

III. That the defendant, not regarding his duty, and without reasonable or sufficient excuse, failed and wilfully refused to attend as commanded.

IV. That thereby the plaintiff, when said action was called for trial, was compelled, for want of the testimony of said defendant, without whose testimony he could not safely proceed to the trial of said action, to move the said court there to postpone [*or continue*] the said action; and the said court did postpone [*or continue*] the same, at the cost of the said plaintiff; and the plaintiff was compelled to pay on said postponement [*or, continuance*], as costs thereof dollars, which sum he was so compelled to pay by reason of the said refusal of the said defendant; to the plaintiff's damage dollars.

[*Or: IV.* That the plaintiff, when said action was called for trial, was nonsuited for want of the testimony of the defendant, and his action was dismissed, with costs, *or otherwise state the substance of the judgment of nonsuit*, and the plaintiff was compelled to pay the same, and the sum of dollars, his costs, counsel-fees, and disbursements in the said action; and that the defendant in said action having become insolvent (*or*, the demand upon which said action was brought having meanwhile become barred by the statute of limitations), the plaintiff lost his demand, to recover which said action was brought, all which was caused by said refusal of the defendant; to the plaintiff's damage dollars.]

WHEREFORE [*demand judgment.*]

1284. Complaint to recover a forfeiture for violation of a city ordinance.

I. That the plaintiff is and was at the times hereinafter mentioned a municipal corporation organized and existing under the laws of the state of

II. That heretofore, and on or about the day of, 19.., the common council of the plaintiff city regularly passed an ordinance entitled "[set forth title]," which said ordinance, among other provisions, provides as follows [set forth those sections of the ordinance as cover offense charged]. [or, a copy of which ordinance is attached to this complaint, made part thereof, and marked Exhibit A]; that thereafter and on or about the day of, 19.., said ordinance was duly approved by the mayor of said city, and was on the day of, 19.., duly published in the official paper of said city.

III. That thereafter, and on or about the day of, 19.., the defendant did, contrary to and in violation of the ordinance aforesaid [set forth the defendant's violation of the ordinance].

IV. That by reason of the premises, defendant has become indebted to the plaintiff in the sum of dollars.

WHEREFORE, etc.

1285. Complaint against a railroad corporation for exacting an illegal rate of fare (Wis. Stats. 1898 secs. 1798 and 1798a).

I. That the defendant is now and was at the times herein-after named, a domestic railroad corporation organized and existing under the laws of this state, and maintaining and operating a line of railroad between the city of and the city of in said state and elsewhere.

II. That on and prior to the day of, 19.., the gross receipts of the defendant corporation resulting from the operation of its said railroad exceeded the sum of three thousand five hundred dollars per mile per annum, and the said defendant was not entitled to demand, collect or receive a greater compensation for the transportation of persons over its said railroad line than three cents per mile.

III. That the distance between said cities of and upon defendant's said railroad line is miles and no more, and defendant is entitled to demand and receive from each passenger, for transportation between said cities the sum of dollars and no more.

IV. That on or about the date above mentioned the plaintiff applied at defendant's ticket office at said to purchase a ticket entitling him to passage between said and, and was ready and willing, and offered to pay for the same the sum of dollars, but defendant's agent refused to sell said ticket for said sum, but wilfully demanded and received of plaintiff the sum of dollars for said

ticket, and plaintiff was compelled to pay said sum, whereby defendant demanded and received from plaintiff cents in excess of the lawful rate of fare as aforesaid.

V. That by reason of the premises the plaintiff has been actually damaged in the sum of dollars.

WHEREFORE the plaintiff demands judgment against the defendant for the sum of dollars [*three times the actual damage*] besides the costs of this action.

1285a. Complaint by state against member of board of review to recover forfeiture for intentional omission of property from tax roll (sustained in *State v. Zillman*, 121 Wis. 472).

The above named plaintiff, by A.... B...., district attorney of county, complains of the above named defendant, and for cause of action alleges:

I. That the defendant is indebted to the plaintiff in the sum of two hundred and fifty dollars (\$250), in accordance with the provisions of section five (5) of chapter three hundred and seventy-nine (379) laws of the state of Wisconsin, passed in the year 1901, entitled, "An act providing for the punishment of assessors and tax payers for asking, accepting, soliciting or giving bribes, favors or rewards in the matter of the assessment or valuation of property, imposing forfeitures for violations of the law by assessors or boards of review and declaring contracts void, made to influence the valuation of property for taxation," and that the particular offense and delinquency for which this action is brought is that the said E.... F...., defendant, was at the time hereinafter mentioned, a member of the board of review for the assessment district of the village of in said county, by virtue of the said defendant being then and there the president of said village of

II. That on the day of, in the year 19.., the defendant herein named, and G.... H...., village clerk, and J.... K...., assessor of said village of, each being members of said board of review by virtue of being respectively clerk and assessor of said village of, did meet and organize and act as a board of review in and for the assessment district comprising the said village of, and the aforesaid J.... K...., the assessor of said assessment district, comprising the village of aforesaid, did then and there lay before said board of review his assessment roll of real property, and all the sworn statements made by others and valuations made by him, the said assessor, of personal property and bank stock.

III. That the said defendant as member of said board of

review in said assessment district did then and there intentionally omit, and did then and there intentionally agree with the said G.... H...., village clerk, as member of said board of review, to omit from assessment a large amount of personal property, amounting in value, as appeared from said sworn statements and assessment roll of said assessor, the sum of dollars, all of which property was then and there liable to taxation in said assessment district, comprising the said village of

WHEREFORE the plaintiff demands judgment against the defendant for the sum of two hundred and fifty dollars, and the costs of this action.

A.... B....
District Attorney for
..... County.

[*Verification.*]

CHAPTER LXXXII.

MISCELLANEOUS COMPLAINTS.

1286. By son of deceased person, for malicious mutilation of corpse.
1287. Complaint by guardian of insane wife against mother-in-law and others for conspiracy to alienate the affections of husband and deprive her of support (the husband being joined as a defendant).
1288. Complaint by trustee of the title of real estate interpleading rival claimants and their creditors, and praying for determination of their rights.
1289. Complaint by tenant against landlord and another tenant for negligently overloading upper floors of a building, causing collapse of building.
1290. Complaint by owner of livestock shipped in another's name against commission merchant, for proceeds of sale.
1291. Complaint for personal injuries from defendant's negligence, and to set aside release obtained by fraud.
1292. Complaint for conspiracy by several to procure an unlawful abortion upon the plaintiff, and the accomplishment thereof.
1293. Complaint, under Wis. Stats. 1898 sec. 1691 as amended by Laws 1905 c. 278, to recover treble the amount of usurious interest paid upon a loan of money.
1294. Complaint by several riparian owners, jointly, to restrain an upper owner from wrongfully diverting water from plaintiff's lands.
1295. Complaint in equity for a continuing trespass caused by building and maintaining a stone foundation wall on plaintiff's lot.
1296. Complaint against surety company upon an undertaking given to release garnishment, and pay judgment, under Wis. Stats. 1898 sec. 2771.
1297. Complaint by creditor of deceased person to reach lands purchased by deceased, and conveyed to another, and subject them to a trust in favor of creditors, under Wis. Stats. 1898 sec. 3835.
1298. Complaint to enjoin use of trademark and label, and to recover damages.
1299. Complaint by grantee of real estate, whose deed was unrecorded, against grantor for conveying same to an innocent purchaser.
1300. Complaint for maliciously filing *lis pendens* and preventing sale of plaintiff's land.

1286. By son of deceased person, for malicious mutilation of corpse (precedent sustained in *Koerber v. Patek*, 123 Wis. 453).

The above named plaintiff, by O.... P...., his attorney, complains of the defendant, and for cause of action alleges:

I. That on or about the day of, 19..., E.... F...., mother of plaintiff, died at, in the city of, county of, state of

II. That plaintiff is the son and heir of said E.... F...., deceased, and was, shortly before the death of said E.... F...., instructed, requested, authorized and charged by said E.... F.... to take charge of her body after her death and see to it that her said body after death be decently and properly buried; that plaintiff is the only person that has had any interest in the said remains of said deceased.

III. That upon the death of said E.... F...., the exclusive legal right and duty of protecting, caring for, and giving and providing a decent and respectable burial to and for, the said dead body of the said E.... F.... devolved upon this plaintiff.

IV. That upon the death of said E.... F...., plaintiff, in the exercise of his right and duty, took charge of the said dead body of the said E.... F.... and caused the same to be removed from the said hospital to the residence of plaintiff at street, in the said city of, and plaintiff then and there took charge of said dead body and duly attended to having the same properly prepared for burial.

V. That thereafter, to-wit, on or about the day of, 19..., and while said dead body was in the possession, care and custody of plaintiff, the defendant came to plaintiff's said residence and requested of plaintiff the permission to merely examine the stomach of said dead body, which said request the plaintiff granted the defendant, but that defendant did then and there, wilfully, maliciously, fraudulently, without the authority and against the wish of plaintiff, and in violation and disregard thereof, without any authority of law, and trespassing upon the rights of plaintiff as custodian of said dead body and as son and heir aforesaid, and outraging said dead body and also the plaintiff, and against, as well, the good morals and peace of the community, with sharp instruments cut out, remove from said dead body, and carry away, the stomach of said dead body, and defendant has ever since refused and neglected to return said stomach, and consequently plaintiff was obliged to and did bury said dead body of his said mother on or about the ... day of, 19..., without, and separate and apart, from the said stomach.

VI. That after the removal of said stomach by defendant from said dead body as aforesaid, and before the burial of said body as aforesaid, plaintiff expressly requested, demanded and

implored the defendant to replace said stomach in its proper place in said dead body, but that defendant always refused and neglected so to do.

VII. That by reason of the acts of the defendant aforesaid, the rights of plaintiff, who was a loving and devoted son of said E.... F...., have been recklessly and wilfully disregarded and trespassed upon, and plaintiff's feelings severely and greatly injured, and the devotion, love and respect that plaintiff entertained for his dead mother have been shocked and wounded, and the plaintiff has suffered greatly therefrom, both in mind and body, to his damage, to-wit, in the sum of dollars.

WHEREFORE plaintiff demands judgment against the defendant for the said sum of dollars, together with the costs and disbursements incurred in and about this action.

O.... P.... Plaintiff's Attorney.

1287. Complaint by guardian of insane wife against mother-in-law and others for conspiracy to alienate the affections of husband and deprive her of support, the husband being joined as a defendant (adapted from complaint sustained in *Randall v. Lonstorff*, 126 Wis. 147).

Now comes the plaintiff above named, by O.... P...., his attorney, and complaining of the defendants, respectfully shows to the court as follows:

I. That the plaintiff is and for many years last past has been, a resident of the state of and was, upon due and proper proceedings had in the county court of county, and on the day of, 19.., duly appointed the guardian of the person and property of one L.... M.... theretofore in said county court duly adjudged an insane person. That this plaintiff duly qualified as such guardian and ever since said, 19.., has been and still is such guardian.

II. Plaintiff further shows that the aforesaid L.... M.... was born and always lived in the city of; that the said L.... M...., prior to the marriage hereinafter set forth was named L.... A...., and after attending the public schools of said city of, was employed in a retail store in said city of and earned her livelihood thereby.

III. That for a number of years prior to, 19.., the said L.... M.... was courted by O.... M...., one of the defendants named herein; and that thereafter, to-wit, on the day of, 19.., at the city of, in the state of, the said L.... M...., then L.... A...., intermarried with the said O.... M.... and that said marriage was solemn-

ized in the presence of a married sister of the said O.... M...., and her husband, who were then living in said city of; that the said O.... M...., and said L.... M.... ever since have been and still are husband and wife, and that ever since the said marriage the real home and residence of said O.... M.... and of said L.... M.... has been the said city of

IV. That during the first years of the married life of said L.... M.... and O.... M.... and until the carrying out of the conspiracy, confederacy and agreement hereinafter recited between the defendants, the said L.... M.... and the said O.... M.... lived happily and pleasantly together and that for about two years they lived together at the home of the parents of the said L.... M.... and were for a time partially supported and taken care of by said parents.

V. That the defendants C.... M...., D.... M.... and E.... M...., are adult children of the defendant H.... M...., and are entirely dependent upon her for their support and maintenance and always have been so, and all reside with the said defendant H.... M.... in the said city of

VI. That the defendant O.... M.... is also a son of the defendant H.... M...., and the husband of L.... M...., as hereinbefore recited and is a man of weak and irresolute character without any settled occupation or position and, as plaintiff is informed and verily believes at all times since his marriage to said L.... M.... has been and still is of sufficient ability to maintain himself and his wife L.... M.... and to earn the means with which to support her, yet he has been for years last past and still is to a great extent dependent for all that he eats, drinks and wears and for his support, upon the bounty of his mother, the defendant H.... M...., and small sums advanced to him at various times by the defendant H.... M.... or other members of the defendant family; and that although at times said defendant O.... M.... does obtain and have considerable property through his spasmodic, but rare, attacks of labor or from speculation, or gift, it is soon dissipated on said defendant O.... M...., or others other than the said L.... M....

VII. That H.... M.... is the widow of one N.... M...., and is a woman of great wealth and now lives and for many years last past has lived in great luxury and frequently travels in Europe and over the United States and with certain others of the defendants herein as more fully appears hereinafter; that she is a woman of imperious will and disposition and has almost complete control over the other defendants herein and keeps them in practically complete subjection to her will, wishes and whims, and that the property of said H.... M.... is of such

a great amount that the individual shares of the children of said H.... M.... upon the decease of said H.... M.... will amount to the neighborhood of dollars each at least.

VIII. Plaintiff further alleges upon information and belief, that the defendants, other than O.... M...., and particularly the defendant H.... M.... were opposed to the intermarriage of said defendant O.... M.... with the aforesaid L.... M.... at the time thereof, on the grounds, as plaintiff is informed and verily believes, that the station in life of the said L.... M.... was not of the exalted position that the defendants arrogate to themselves and that the family from which said L.... M.... descended were not blessed with any considerable amount of worldly goods and not members of the same select circle in which the defendants herein fondly believe they are enshrined.

IX. Plaintiff further alleges upon information and belief, that shortly after the intermarriage of the defendant O.... M.... with L.... M.... as aforesaid, the other defendants herein maliciously, wickedly and fraudulently conspired and agreed together and for the purpose of separating the defendant O.... M.... from the said L.... M.... so as to deprive the said L.... M.... of the support and assistance of the said O.... M.... and to alienate and destroy the affection of the defendant O.... M.... towards the said L.... M...., and to prevent and interfere with the said O.... M.... providing the said L.... M.... with the necessities of life and further for the purpose of influencing the said O.... M.... to remain without the state of and beyond the jurisdiction of its courts and to keep and maintain the said O.... M.... so without the state of and beyond the jurisdiction of its courts that service of process issuing out of any of the courts of the said state of upon said O.... M.... upon behalf of said L.... M.... might be prevented and rendered of no force and effect and to prevent and to avoid any action being commenced by the said L.... M...., or the obtaining of any decree or judgment of any court, civil or criminal, to compel the said O.... M.... to support and maintain the said L.... M.... under any of the statutes of the state of, whether civil for a divorce suit or criminal for the unlawful desertion and abandoning of the said L.... M.... by O.... M.... or to prevent the said L.... M.... from obtaining any relief, support or maintenance from the said O.... M....

X. Plaintiff further alleges upon information and belief, that the said defendants for the carrying out of said conspiracy, caused and procured the discharge of the said O.... M.... from various places in which he was employed during the time he

lived with the said L.... M.... for the express purpose of preventing him from supporting the said L.... M.... and to keep her as aforesaid in poverty and destitution and repeatedly, falsely and fraudulently stated to said O.... M.... for the further carrying out of the conspiracy aforesaid, that the said L.... M.... was untrue and unfaithful to him, the said O.... M....

XI. Plaintiff further alleges upon information and belief, that to further carry out the purpose, agreement, conspiracy and confederacy of the said defendant, the defendants have repeatedly urged the said O.... M.... to desert and leave the said L.... M...., his lawful wife as aforesaid, and to go beyond the state of and have provided the said O.... M.... with large sums of money to so go without the state of and remain therefrom, and certain of the defendants herein have taken said O.... M.... upon a trip to Europe and furnished large and lavishly for his expenses on the same for the express purpose of carrying out the end and object of said conspiracy aforesaid; and have so influenced the said O.... M.... by said means and by threats that the defendant H.... M.... would disinherit said O.... M.... and would so arrange her last will and testament that said O.... M.... would be given no part or parcel of her vast wealth and estate, that said O.... M.... has finally joined the other defendants named herein in their nefarious and unholy scheme and confederacy aforesaid.

XII. Plaintiff further alleges upon information and belief that subsequent to the appointment of the plaintiff, guardian of said L.... M.... as aforesaid, the said defendants have continued in the aforesaid unlawful, wicked and malicious conspiracy and confederacy to keep and maintain the said O.... M.... without the state of as aforesaid and beyond the jurisdiction of its courts, both civil and criminal, and to keep and maintain the said L.... M.... in poverty and destitution and to force her, if possible, to consent and to allow of a judgment of divorce to be obtained by the said defendant O.... M.... in some other jurisdiction than that of the state of where it would be impossible on account of the poverty and condition of the said L.... M.... to appear or to protect her rights or obtain any relief whatever as against said O.... M....

XIII. Plaintiff further alleges upon information and belief, that for the further carrying out of said conspiracy, the said O.... M.... commenced several divorce suits without the state of: one in the state of against the said L.... M...., which was dropped by said defendant O.... M....,

and thereafter and since the commitment of the said L.... M.... as aforesaid to the county hospital for the insane, and the adjudication of her as an insane person as aforesaid, commenced a divorce suit in the court of the state of for county, in which the complaint therein is verified by the said O.... M...., on or about, 19..., and based upon false and untrue allegations and containing no statement of the fact, then, as plaintiff is informed and verily believes, well known to said defendant O.... M...., of the commitment of said L.... M.... and of her insane condition, nor of the appointment of this plaintiff as guardian aforesaid, and plaintiff verily believes that the same was for the purpose of imposing upon and deceiving said court. That the other defendants herein with knowledge thereof have assisted and are assisting the said O.... M.... with aid, money and advice in carrying on and continuing said false and fraudulent attempt at divorce in the said state of, all for the purposes aforesaid.

XIV. That the said L.... M.... has now and for the two or more years last past has had a good and valid action for divorce against said defendant O.... M.... for the wilful desertion of said L.... M.... by said O.... M.... for a term of more than one year, and for a further cause, the cruel and inhuman treatment of said L.... M.... by said O.... M.... and for a further cause that the said defendant O.... M...., being of sufficient ability, has and does refuse and neglect to provide for said L.... M...., and for a further cause that the conduct of said defendant O.... M.... towards said L.... M.... is and has been such as may render it unsafe and improper for her to live with him.

XV. That the said L.... M.... is without means or property whatsoever of her own and that there are no means belonging to said L.... M.... coming to this plaintiff as guardian of L.... M.... sufficient to pay even the dollars per week board and the dollars a year for clothing required of the patients confined and kept in said county hospital for insane and that said L.... M.... has been since her commitment and still is a charge upon county and required to be supported and cared for by said county as other paupers are. That the conspiracy and agreement aforesaid between the defendants and the carrying out of the same has beggared the said L.... M...., deprived her of her support, alienated the affections of her said husband, unseated her intellect, and has deprived her and this plaintiff, as her guardian aforesaid, of all the rights hereinbefore specified, existing in favor of said L....

M.... and this guardian as against the said O.... M...., all to the plaintiff's damage in the sum of dollars.

WHEREFORE plaintiff demands judgment against the said defendants in the sum of dollars, together with his costs and disbursements.

O.... P....

Plaintiff's Attorney.

[*Verification.*]

1288. Complaint by trustee of the title of real estate interpleading rival claimants and their creditors, and praying for determination of their rights (precedent in Winn v. Itzel, 125 Wis. 19 s.c. 103 N. W. 220).

And now comes the said plaintiff and pursuant to the order and direction of the court, for a supplemental and amended complaint in this action, respectfully shows unto said court:

I. That on and prior to the day of, 19.., one L.... M.... was the owner in fee simple and in possession of the following described land in the fourth ward of the city of, viz [*give description*]. That on that day the said L.... M.... made, executed and delivered to this plaintiff a deed in trust of said premises, upon certain trusts, one of said trusts being to convey the same to such persons as the said L.... M.... should by instrument in writing or by will appoint, a copy of which is hereto attached, marked "Exhibit A." That upon the execution of said deed this plaintiff entered into possession of said property and has since remained, and is now, in possession thereof.

II. This plaintiff further shows that on or about the day of, 19.., the said L.... M...., who was then a resident of the city of in the said county, departed this life testate. That thereafter, and on the day of, 19.., due proceedings in that behalf having been first duly had, the last will and testament of the said L.... M.... and the codicil thereto were duly admitted to probate by the county court of county. That copies of such will and codicil are hereto annexed marked "Exhibit B" and "Exhibit C," and made a part hereof. That the said X.... and Y.... mentioned in said will having filed in said court their refusal to serve as executors, this plaintiff was appointed by said court executor of said will, and thereupon this plaintiff took the oath and duly qualified as such executor, and letters testamentary were duly issued to him out of and under the seal of said court as sole executor of and under said will.

III. This plaintiff further shows that on the day of

....., 19.., the said defendant C.... D.... filed for record in the office of the register of deeds of county a deed purporting to have been executed by the said L.... M.... on the day of, 19.., and that said deed was thereupon duly recorded by the register of deeds on said day in his said office, in volume of deeds on pages and

IV. And this plaintiff further shows that the said C.... D.... claims that the said deed was duly executed and delivered to her by the said L.... M.... on the day the same bears date, and that the same amounts to an execution by the said L.... M.... of the power reserved in said deed to appoint the person to whom this plaintiff shall convey the said lot nine. That the said C.... D.... claims under and by virtue of said deed to be the owner of said lot nine.

V. This plaintiff further shows that the said defendants V.... and W.... on the other hand insist and claim that at the time of the execution and delivery of the said pretended deed of which a copy is hereto annexed, marked "Exhibit D" the said L.... M.... was of unsound mind and mentally incapacitated from making that or any deed or contract or appointment, and that the same was procured by means of the fraud of the said C.... D.... and the exercise of her undue influence upon the said L.... M...., and the said defendants V.... and W.... demand of this plaintiff that he ignore and treat as a nullity the said pretended deed of the said L.... M.... to the said defendant C.... D...., and that he convey said lot nine to them under and pursuant to the terms of the said last will and testament of the said L.... M....

VI. And this plaintiff further shows unto the court that on the day of, 19.., a judgment was docketed in the court of said county against the said defendant C.... D.... for dollars, in favor of one G.... H....; and that on the day of, 19.., a judgment was docketed in said court in favor of the said defendant E.... F.... for the sum of dollars against the said defendant C.... D...., and that both of said judgments remain of record unsatisfied in the office of the clerk of the said court. That the said plaintiff is informed and verily believes that the said defendants G.... H.... and E.... F.... claim the said judgments to be valid and subsisting liens against the said premises.

That this plaintiff is in doubt as to his duty in the premises, and therefore prays this court to determine the question of validity or invalidity of the said deed to the said C.... D...., and by its judgment herein to determine the rights of the parties and give to him proper direction in the premises, and for such other and further relief as shall be just and according to equity.

1289. Complaint by tenant against landlord and another tenant for negligently overloading upper floors of a building, causing collapse of building (sustained in B. B. & C. Co. v. Rees, et al., 69 Wis. 442).

I. That as plaintiff is informed and believes, the said defendant C.... D.... was on said day of, 19..., ever since has been, and now is, the owner of a brick block known as Block, and situated on street in the fourth ward of said city; that said block is four stories high above the basement, and is divided into several stores by partition walls; that said stores are rented by said defendant C.... D.... to tenants; that the north store of said block is known as No., ... street, and the store in said block next adjoining on the south is known as No. of said street.

II. That as plaintiff is informed and believes, prior to the said day of, 19..., the said defendant C.... D.... and said defendant E.... F.... entered into negotiations for the purpose of leasing from said defendant C.... D.... to said defendant E.... F.... the store known as No., ... street, and the fourth floor of said store No., ... street; that said defendant E.... F.... then and there notified and informed said defendant C.... D.... that the purpose for which they wished to lease and use said store No. and said fourth floor of said store No. was as a shop and warerooms for the manufacture, storing and selling of stoves, wire, iron and other articles of great weight; that they desired especially to use said fourth floor of said store No. for storing thereon iron, wire, stoves and other articles of great weight, and that they needed for that purpose a strongly built building; that said defendant C.... D.... then and there stated and represented to said defendant E.... F.... that said stores were strongly built and the floors thereof capable of sustaining great weight, and fit for the purposes for which the said defendant E.... F.... desired to use the same as aforesaid; that said fourth floor of said store No. would sustain, and that he, said E.... F.... could safely store and place thereon weight to the amount of two hundred pounds to each square foot of said floor; that thereupon the said defendant E.... F...., relying upon said statements and representations of said defendant C.... D...., then and there agreed to lease said premises from said defendant C.... D...., and that pursuant thereto the latter did on or about the day of, 19..., lease, demise, and let said store No. and said fourth floor of said store No. to the defendant E.... F.... as a shop and warerooms for the manu-

facture, storage and sale of stoves, iron and other articles as above stated for the term of five years from, 19.., said lessees yielding and paying therefor to said defendant C.... D.... the annual rent of dollars.

III. That thereupon, and on or about the day of, 19.., the said defendant E.... F.... went into possession of said store No. and said fourth floor of said store No., using the same for the purposes aforesaid under said lease, and continued to occupy the same and paid rent therefor to said defendant C.... D.... as above stated, up to and including the time that said fourth floor broke down and fell, as hereinafter stated.

IV. That it was understood and intended at the time that said premises were leased as aforesaid on the part of said defendant that the same were to be used for the purposes aforesaid, but this plaintiff avers that said premises, and especially said fourth floor of said store No. was at the time said lease was made, and ever since has been unfit for the purposes for which they were leased as aforesaid; that said floor of said fourth story was not strongly built, and was unfit for storing stoves, iron, hardware and other articles of great weight; that it could not sustain, and that it was not safe to place thereon weight to even the amount of one hundred pounds to the square foot; that said representations and statements of said defendant C.... D.... were false and untrue, as said defendant C.... D.... knew, or had reason to know.

V. And this plaintiff further shows that on or about the day of, 19.., the said defendant C.... D.... leased, demised and let to this plaintiff the first and second stories of said store No., ... street, as and for a shop and warerooms for the manufacture and sale of billiard tables and other merchandise, for the term of five years from, 19.., at and for the agreed rent of dollars a year for the first two years, and dollars a year for the last three years; that on or about said day of, 19.., this plaintiff went into occupation of said first and second stories of said store No. under said lease, using the same for the purposes aforesaid, and yielding and paying to said defendant C.... D.... said rent until the falling of said fourth floor as hereinafter stated. That on or about the day of, 19.., the said defendant E.... F...., relying upon the representations of said defendant C.... D...., that said floor was fit and strong to carry a weight of two hundred pounds to the square foot, and using said fourth floor of said store No. for storage as aforesaid, carelessly and negligently placed and stored

thereon a great amount of iron, wire and other articles of great weight of a like character, weighing in all about ninety-eight thousand pounds; that such iron, wire, and other articles were stored and placed on said floor in a space about thirty feet long and nineteen feet six inches wide, making a burden of about one hundred and sixty-seven pounds to the square foot on said floor, which was a much greater weight than is ordinarily put upon the fourth floor of a store, and more than he, the said defendant E.... F...., would have stored on said floor had he not been so misinformed as to its strength by said defendant C.... D.... That thereupon and on said day of, 19.., by reason of such great weight of iron, wire and other articles placed thereon as aforesaid, and by reason of said floor being unfit for the purposes for which it was leased and used as aforesaid, the said floor gave way and both said floor and said iron, wire and other articles stored thereon broke down and through the remaining floors of said store, including the floors occupied by this plaintiff as aforesaid, and fell into the basement of said building; that thereby and by reason of the fault and negligence of said defendants C.... D.... in leasing for storage as aforesaid said premises, and by reason of their misrepresentations as to the strength of said fourth floor of said store No., and by reason of the weakness of said floor and its unfitness for the purposes for which it was leased and used as aforesaid, and by reason of the fault and negligence of said defendant E.... F.... in storing and placing on said floor such great weight as aforesaid, thereby overloading said floor so that it fell as aforesaid, the goods and wares of this plaintiff were injured and destroyed, and the plaintiff otherwise greatly injured and damaged.

VI. That there was thereby then and there destroyed and injured goods and wares of the plaintiff to the amount and of the value of dollars, and that the plaintiff was also deprived of the use of said premises leased by it as aforesaid for the space of three weeks, to its damage dollars, and that by reason of the destruction of said premises the employees of said plaintiff were compelled to and did lie idle for the space of three weeks, until said premises were repaired and again rendered fit for occupation by the plaintiff, to its damage dollars, making in all the sum of dollars loss and damage suffered and sustained by reason of the fall of such floor as aforesaid.

WHEREFORE the plaintiff prays judgment against said defendants for said sum of dollars and the costs of this action.

1290. Complaint by owner of livestock shipped in another's name against commission merchant, for proceeds of sale (sustained in Potter v. Van Norman, 73 Wis. 339).

The plaintiff, for cause of action against the defendant, says:

I. That prior to, 19.., the plaintiff and one X.... Y.... were the owners of, and in possession of a lot of live hogs, at in the state of, of the value of about dollars.

II. That a few days prior to said, 19.., this plaintiff delivered the said hogs to the Railway Company, at said, and by verbal arrangement and agreement between him and said X.... Y...., consigned the same in the name of this plaintiff as consignor, and to be transported to and delivered by said Railway Company to defendant, a commission merchant at in the state of, to be sold by him for this plaintiff, and to account to him for the net proceeds or value thereof.

III. That after said property had been so shipped and consigned by this plaintiff, as aforesaid, and in his name, and as the same was about to be started to, the plaintiff and one G.... H.... entered into a verbal agreement, whereby the plaintiff was to sell to said G.... H.... the said property, on the payment to him of the cost thereof, to-wit, ... dollars, and dollars more, the whole to be paid to plaintiff from the proceeds of such stock as soon as sold, and that this plaintiff was to be and remain the full and absolute owner of such property, and the title and right of possession thereof were to remain in him till he was so paid the said sum therefor, and that said property should go forward to in the name of this plaintiff as consignor, as already consigned, and that said G.... H.... would be entitled to receive from the proceeds thereof only the excess of its actual cost and dollars aforesaid, and that no part of said sum has ever been paid plaintiff for said stock.

IV. That after such agreement was so made between plaintiff and said G.... H...., as aforesaid, the said G.... H...., without the knowledge, consent or authority of plaintiff, or plaintiff and said X.... Y...., and in their absence, procured and induced a clerk of the agent of said railway company at said, to so change the shipment thereof that the property would go forward in the name of said G.... H.... as consignor; and said clerk thereupon so changed the name of the consignor from that of plaintiff to that of said G.... H...., and the

said lot of hogs was thereupon forwarded to said defendant in the name of said G.... H.... as consignor, as aforesaid, but this plaintiff was, in fact, the real owner thereof, and entitled to the proceeds of the same, as aforesaid.

V. That said defendant duly received said lot of hogs, being one car load, and conveyed and delivered to him in car No. of said Railway Company, about, 19.., and on or about the same date sold the same and received therefor the sum of dollars, above all expenses of sale and transportation.

VI. That said defendant, prior to the receipt of, or sale of said hogs, had due and full notice of the plaintiff's ownership of, and rights in and to the proceeds or value thereof, as aforesaid, and plaintiff duly demanded of him such value before the receipt or sale thereof by defendant, but notwithstanding this, said defendant has unlawfully, and without plaintiff's or plaintiff's and said X.... Y....'s consent, converted to his own use the aforesaid value of said hogs, to-wit, the sum of dollars, and refused and still refuses to pay or account to plaintiff, or plaintiff and said X.... Y.... therefor, though due demand has been made on him by plaintiff so to do.

VII. That plaintiff is informed and believes that said defendant claims that said G.... H.... was indebted to him in open account, at and prior to the shipment of said hogs or the receipt thereof by him, in a sum equal to or greater than their value, and that he has passed to the credit of said G.... H.... the value of said hogs, and for this reason refuses to pay plaintiff therefor, but plaintiff says that such indebtedness, if any exist, from said G.... H.... to defendant, was not incurred in any way by reason of or upon the strength of the shipment of said stock having been changed, as aforesaid, from the names of this plaintiff as consignor to that of said G.... H...., and defendant has suffered no damage nor incurred any risk in any way in consequence thereof, but on the contrary, passed to the credit of said G.... H...., if he has done so at all, the proceeds of such stock after full notice of plaintiff's rights in and to the said proceeds.

VIII. That prior to the commencement of this suit, and in pursuance of the original agreement between said X.... Y.... and this plaintiff, whereby the said hogs were shipped in the name of plaintiff, the said X.... Y.... has duly assigned in writing to this plaintiff all his interest in and to the said hogs, and all his interest in or claim against said defendant for the value of said property, or damages for its conversion, as afore-

said, and plaintiff is the full owner of all such claims and demands against said defendant.

WHEREFORE plaintiff asks judgment against said defendant for said sum of dollars, with interest from, 19.., and costs of suit.

1291. Complaint for personal injuries from defendant's negligence, and to set aside release obtained by fraud (sustained in Whetstone v. Beloit Straw Board Co., 76 Wis. 613).

I. [*Set forth cause of action for negligent injury as in forms in Chapter LIX, supra, and continue as follows*]:

II. That on or about the day of, 19.., the defendant induced the plaintiff to sign and deliver an agreement of settlement and release for his said injuries, in words and figures as follows, to-wit [*set out copy of agreement, or allege its substance*].

III. That when the plaintiff signed said agreement he was physically very weak and was not in possession of his senses by reason of his aforesaid injuries, and did not know or realize what he was doing, or the effect of said agreement or any of the provisions thereof, and that his said condition was known to the defendant, but that the defendant, taking advantage of the plaintiff's said condition, fraudulently procured the plaintiff's signature to the said instrument, notwithstanding he well knew that the plaintiff did not and could not comprehend what he was doing, or the nature of said agreement.

IV. That the defendant has paid to plaintiff dollars upon said agreement, and that the plaintiff has given receipts for the same bearing dates, ..., ..., and, 19...

V. That when the plaintiff recovered so as to be able to give any thought to a business transaction, on being informed of the above agreement, he supposed it was final and binding and that he had no remedy; that he sent for an attorney as soon as his physical and mental condition made it proper for him to do business, and that on being informed said instrument was void he refused to receive any further payment.

VI. That on the day of, 19.., the plaintiff tendered the defendant dollars for all payments made to him by the defendant, with interest, and notified the defendant that the contract was rescinded; that the defendant refused to receive the money, and that the plaintiff now brings the said money into court.

VII. That the plaintiff has suffered damages by reason of said injuries, in the sum of dollars.

WHEREFORE the plaintiff demands judgment that the said contract in this complaint mentioned be delivered up by said defendant and be declared null and void, and that he recover judgment against the said defendant for the sum of dollars, together with his costs and disbursements in this action.

1292. Complaint for conspiracy by several, to procure an unlawful abortion upon the plaintiff, and the accomplishment thereof (sustained in *Miller v. Bayer*, 94 Wis. 123).

Plaintiff herein, complaining of the above named defendants, respectfully alleges and states to this court:

I. That plaintiff is of the age of twenty-one years, that the date of her birth was, 19.., and that she has never been married.

II. That for more than two years prior to, 19.., she was employed as a domestic at the house of C.... D.... and E.... D...., in the city of and state of, and has continuously resided in the family of said defendants during said period as domestic as aforesaid.

III. That in, 19.., on or about the middle of said month, she was assaulted at the said residence of said defendants C.... D.... and E.... D...., and while a servant as aforesaid in the family of said defendants, by H.... D...., a son of said defendants, and raped and ravished by force and against her will. That thereafter and on several occasions plaintiff was raped and ravished by said H.... D...., at the residence of said D....'s in said city of, ... That by reason of said acts of sexual intercourse so accomplished as aforesaid, plaintiff in the month of, 19.., became and was pregnant with child by the said H.... D.... Plaintiff avers that said H.... D.... was during the times herein alleged residing in the same house with his said parents, the said C.... and E.... D....; that plaintiff was on and prior to said assault a woman of chaste character.

IV. Plaintiff alleges that the said defendants, the said D....s, C.... D.... and E.... D...., became and were cognizant of the fact of plaintiff's said pregnancy, as plaintiff is informed and believes, some time in, 19..; and that said H.... D.... knew of plaintiff's pregnancy, 19.. Plaintiff avers that by compulsion, and duress and threats of said H.... D...., plaintiff was compelled and did submit to the taking of medicine furnished by the defendant G.... H....

[then and there being a practicing physician in the city of] to produce a miscarriage on plaintiff. Plaintiff alleges that she continued as a domestic as aforesaid in the family of said D....s until the day of, 19.. That at said time, and for some time theretofore, the said C.... D.... and E.... D.... had full knowledge of the said fact of plaintiff's said pregnancy, and that their son H.... D.... was the cause thereof, and to prevent scandal and to endeavor to save the reputation of their said son, entered into a conspiracy with the said G.... H.... and their said son to cause a criminal operation to be performed upon the body of plaintiff, and to have the said G.... H.... perform an abortion upon the body of the said plaintiff. That pursuant to said conspiracy, plaintiff was removed to the house of one L.... M.... in said city of on the day of, 19., and on the day of, 19., in said city of, ..., said criminal operation was performed on the body of this plaintiff by the said G.... H.... That this plaintiff was then quick with child, which fact was well known to each and all defendants prior to the performing of said abortion as aforesaid. That by reason of said criminal operation, plaintiff became and was sick nearly to death and became and was as she believes, permanently injured. That the health of plaintiff theretofore good has since been very poor. That by reason of said operation, she was sick and ill at said house of said L.... M.... for two and one-half weeks, and thereafter was removed to the hospital in said city of, and there attended by the physicians and sisters in said hospital, and ill and most of the time confined to her bed at said hospital, from the day of, 19., until, 19.. She avers that by the collusion of all of said defendants plaintiff was secretly kept at the house of said L.... M...., and all knowledge thereof kept from the parents of plaintiff. That on the day of, 19., by the assistance of the police force of said city of, the whereabouts of plaintiff were discovered by the parents of plaintiff, and on so finding her as aforesaid, said parents caused the plaintiff to be removed to said hospital for treatment for the illness caused by said abortion.

V. That by reason of the facts the health of the plaintiff has been permanently injured, and she has suffered great mental anguish and bodily pain, and in her reputation and good name, and been greatly damaged, in the sum of dollars, and specially damaged in the expenses of said illness and care at said hospital in the sum of at least dollars, and in the

loss of her time and services in the sum of at least dollars.

WHEREFORE plaintiff prays judgment against the defendants, and each of them, for the sum of dollars, and her costs and disbursements herein.

1293. Complaint under Wis. Stats. 1898 sec. 1691 as amended by laws 1905 c. 278, to recover treble the amount of usurious interest paid upon a loan of money (sustained in *Matthieson v. Schomberg*, 94 Wis. 1).

I. That on or about the day of, 19.., the said defendant did, at the instance and request of these plaintiffs, loan to them the sum of dollars.

II. That the said defendant did, as a condition of the making of said loan to these plaintiffs, demand of them that they should not only repay to the said defendant the said sum of dollars, but also, in addition thereto, a large, exorbitant and usurious sum of money, to-wit, the sum of dollars, for the loan of the sum of dollars loaned to these plaintiffs for the time the same should be retained by them, as hereinafter alleged and set forth.

III. That these plaintiffs did accede to the demands of the defendant, and did, on or about the day of, 19.., make, execute and deliver to the said defendant, their two certain promissory notes in writing, of which the following are true copies, to-wit [*set forth copies of notes*].

IV. That no other or greater consideration has ever been had or received by these plaintiffs for said notes than the said sum of dollars.

V. That these plaintiffs did have and retain the full sum of two thousand five hundred (\$2500) dollars, loaned to them by the said defendant, from the date of said note until the 28th day of November, 1892, at which time they paid to the said defendant the sum of five hundred (\$500) dollars on account of said loan.

VI. That these plaintiffs did then have and retain of the said sum of money loaned to them, the sum of two thousand (\$2000) dollars from the 28th day of November, 1892, until the 10th day of January, 1893, on which last mentioned day they paid to the said defendant the sum of five hundred (\$500) dollars on account of said loan.

VII. That these plaintiffs then had and retained of the amount loaned to them, the sum of one thousand five hundred (\$1500) dollars from the 10th day of January, 1893, until the 16th day of January, 1893, on which last mentioned day they

paid to the said defendant the sum of five hundred (\$500) dollars on account of said loan.

VIII. That these plaintiffs then had and retained of the amount of said loan the sum of one thousand (\$1000) dollars from the 16th day of January, 1893, until the 25th day of January, 1893, at which last mentioned day they paid to the said defendant the sum of one thousand (\$1000) dollars on account of said loan.

IX. That all of said sums of money paid by these plaintiffs to the said defendant were paid to the said defendant at his own instance and request, and that the defendant did accept and receive the same.

X. That on or about the 25th day of January, 1893, the said notes were surrendered to these plaintiffs by the said defendant, and these plaintiffs did then make, execute and deliver to the said defendant their joint promissory note in writing to secure the payment, to the said defendant, of the balance remaining unpaid of the amount of said first mentioned notes, viz: dollars, of which said note the following is a true copy, to-wit [*insert copy of note*].

XI. That no other consideration was ever had or received by these plaintiffs for the said last mentioned note than as above mentioned and set forth.

XII. That the said defendant did receive and accept the said last mentioned note in the place and stead of said first mentioned notes, and did thereafter, and before said note became due, indorse and transfer the said note for dollars to the Bank, of

XIII. That on or about the day of, 19.., the said Bank made a voluntary assignment of its property, effects and credits, including the said last mentioned note, to C.... D...., for the benefit of its creditors.

XIV. That the said C.... D...., as such assignee of said bank, did make demand on these plaintiffs for the payment of said note.

XV. That on or about the day of, 19.., these plaintiffs did pay to C.... D.... as assignee of said bank, the sum of dollars on account of said note, and did fully satisfy said note, and said note was cancelled and surrendered and delivered to these plaintiffs.

XVI. That the amount of interest upon the amount of said loan of two thousand five hundred (\$2500) dollars, and the several parts thereof, for the entire time the same and the several portions thereof respectively, were retained by these plaintiffs,

computed at the rate of ten (\$10) dollars upon one hundred (\$100) dollars for one year, is forty-nine dollars and sixteen cents (\$49.16).

XVII. That these plaintiffs have paid and the said defendant has received for said loan a much greater sum of money than interest thereon at the rate of ten (\$10) dollars upon one hundred (\$100) dollars for one year, to-wit, the sum of one thousand (\$1000) dollars.

XVIII. That these plaintiffs have paid and the defendant has had and received for said loan of money, in excess of interest at the rate of ten (\$10) dollars upon one hundred (\$100) dollars for one year, the sum of nine hundred fifty dollars and eighty-three cents (\$950.83).

XIX. That one year has not elapsed since the payment of all and any of said sums of money.

WHEREFORE these plaintiffs demand judgment against the said defendant for treble the amount of the money so paid for said loan in excess of interest at the rate of ten (\$10) dollars upon one hundred (\$100) dollars for one year, to-wit, for the sum of dollars, with costs and disbursements of this action.

1294. Complaint by several riparian owners, jointly, to restrain an upper owner from wrongfully diverting water from plaintiff's lands (sustained in G. R. W. P. Co. v. Bensley, 75 Wis. 399).

I. That each of these plaintiffs is a corporation duly organized under the laws of this state, each having its office and principal place of business at in said county. That the plaintiff A.... B.... company is the owner in fee of the following described premises, rights and privileges in said county, to-wit [*describe lands*]. That all of said lands and premises are upon and appurtenant to the river, which in passing down stream and over the same, has from said lands on said section to the south line of said lands on section a fall exceeding ten feet. That said river at, and immediately above the railroad bridge on said lot seven of section is readily improved by dams, thus forming valuable water powers. That the principal and almost sole value of said lands and premises consists in their opportunity and readiness of improvement in connection with said rights and privileges, for hydraulic purposes.

II. That this plaintiff, the C.... D.... company, is the owner in fee of the following described real estate, privileges, and easements, situated, lying and being in said county,

to-wit [*describe premises*]; and it is also the owner of the riparian rights, rights of flowage and right of way along the river up stream from that portion on said fractional lot eight to the south line of the right of way of the said Railway, and is the owner of all dams and improvements for hydraulic purposes upon, or connected with said premises, and has good right and lawful authority perpetually to build, keep up and maintain all such dams and improvements. That the said premises are chiefly valuable for the water power and mills connected therewith, this said plaintiff, the C.... D.... company having and owning a large and valuable pulp mill, situated and being upon said fractional lot eight, the wheels and machinery of which are propelled by the waters of said river. That said waters of said river are turned to the mill of this plaintiff by means of, and said water power is formed by, a system of dams extending up stream from said mill, and westerly across the main channel of said river to near the foot or south end of what is commonly known as "Nine Acre Island."

III. That this plaintiff, the E.... F.... company, is the owner of the north half of said "Foundry Island," on the said fractional lot eight, of section, together with the water rights and privileges appurtenant thereto. That it has upon said premises a large and valuable flouring and grist mill, the wheels and machinery of which are propelled by the waters of said river, taken from the pond formed by the said system of dams of the said C.... D.... company.

IV. That hereto annexed, and forming a part of this complaint, is a plat or map marked "Exhibit X," showing with substantial accuracy, the course and direction of the river as it is, and since the time when the memory of man runneth not to the contrary, hath been located in said section in township north, of range east. That said map shows with substantial accuracy the premises, dams, channels, islands, and their names, mills, etc., in question in this action, as also the relative distances and direction of currents and streams of water as indicated by arrows.

V. That said river is, and ever has been a navigable stream.

VI. And these plaintiffs further allege that the defendant is, or claims to be, the owner of a large pulp mill situated upon the west side of said river upon fractional lot four of said section, at a point further down stream than the mills of plaintiff aforesaid, and that a few rods up stream from the defendant's said pulp mill is the flouring mill of the milling company. That as is indicated and shown upon said map "Ex-

hibit X" heretofore, and up to this time, the water to run and operate the defendant's pulp mill, and said flouring mill, has for many years been obtained by confining the water running into the slough at the head, and on the westerly side of "Big Island," and causing it to run around on the west side of "Hunter's Island" and "Nine Acre Island," and through an artificial channel a distance in all of upwards of three miles to said mills. That to keep said water in said slough, and cause it to run on the west side of said islands, the defendant and her grantors have for many years built and kept up and maintained a dam across the so-called "Lost Channel" at the head of said "Hunter's Island," a dam from the foot of "Hunter's Island" to "Nine Acre Island," and a dam from the foot of "Nine Acre Island" to what was formerly a part of the main west shore, where the artificial channel begins. That the waters of said river flowing into said slough at the head of Big Island would, if left unconfined, return again to the main channel of said river at the foot of said islands, mainly at the foot of said Big Island, through said lost channel; and would mingle with and spread out over the waters of such main channel above, and before passing the mills, premises and mill-sites of said plaintiffs on said fractional lots seven and eight of said section . . . and that in a natural state of the said stream, less than one-sixth of the waters therein at and above the head of said Big Island would and did originally flow into and down said slough. That as now and heretofore confined the main part of said waters flowing into said slough are not permitted to flow back again into the main channel of said river until they have passed the said mills and sites of these plaintiffs. And plaintiffs insist and allege that such confinement and changing of the natural flow of said waters is and ever has been, unreasonable and in fraud of plaintiffs' rights to the natural flow of waters of said river. That as riparian owners of said fractional lots six, seven and eight in section . . . , these plaintiffs have and of right ought to have the free, natural and unobstructed flow of the waters of said river upon and adjoining their premises.

VII. - And plaintiffs further show that at divers times during the past three years the defendant has greatly enlarged and increased in width and depth said artificial channel above and leading to her said mill; that she has during said time, blasted out, deepened and enlarged much of said slough from Hunter's Island to the head of said Big Island, and she has during said time greatly raised and improved the said dams between said islands for the sole purpose, and with the intent, of drawing into said slough, and diverting from the main channel of said

river, and holding and confining therein until used by her said mill and said flouring mill, more of the waters of said river than would, or have theretofore flowed into and down said slough. That by means of such enlargements and changes, the defendant has diverted from the said main channel far more of the waters of said river than theretofore and before such enlargements and changes naturally flowed into and down said stream; and by such diversion has and does greatly diminish the waters flowing to the premises and mills of these plaintiffs, to their great and irreparable loss and damage. That such diversion is unreasonable, unlawful, and in fraud of the riparian rights, not only of these plaintiffs, but of all owners of lands upon the easterly side of said river in said sections; and it has been a serious injury to the navigation of said river. That by reason of the diversion of the waters of said river by the defendant as aforesaid, the small portion remaining in the main channel and spreading out over the same in thin quantities before reaching the mills and premises of plaintiffs, has become and is by absorption in warm weather, and low stages, and by freezing in winter, greatly diminished in quantity, so much so as frequently to necessitate the stoppage of the mills of the plaintiffs.

VIII. That notwithstanding the premises, the defendant is now engaged with at least forty men, many teams and implements, in still further deepening and enlarging said slough and channel and changing the location of said dams abutting upon Hunter's Island, for the purpose of causing water to flow out of the main channel of said river and down said slough. That from the head, or north end of said Hunter's Island to the south end thereof, through and by way of said Lost Channel, is a much greater fall and wider channel with less obstruction than by the slough, or channel on the west side of said Island, where the water has heretofore been made to flow. That to get the benefit of the greater fall down said Lost Channel, and the greater force and suction upon the stream running into said slough at the head of said Big Island, the defendant is now engaged in building a long tight dam at the foot of said Big Island, and connecting it with a small island, lying south-easterly of the foot of said Hunter's Island, and also another dam from the foot of said small island to near the head of said "Nine Acre Island;" intending when said dams are complete to remove the dam heretofore maintained from the head of said Hunter's Island to said Big Island, thus causing the waters in said slough to flow mainly down said Lost Channel, and around the foot of Hunter's Island, and west side of Nine Acre Island, and to the mill of the defendant. That by thus changing her

dams she secures the benefit to her and the increased suction upon the slough above of the two channels around Hunter's Island. That she has, with a large crew of men, entered upon the lands of this plaintiff, the A.... B.... company, at the head of said Big Island, and taken possession thereof, and has built a temporary dam, or coffer dam, at the head and across the mouth of said slough, and is engaged with men and teams digging out, deepening and enlarging said slough at and near its mouth, and from there to the head of said Hunter's Island.

IX. That the entry and possession of the defendant upon and of the lands of this plaintiff, is wrongful and unlawful, and if not restrained will, as plaintiffs greatly fear, result in violence and a multiplicity of suits.

X. That the dams being erected by the defendant at the foot of Big Island and the head of Nine Acre Island, are intended for permanent work, and are not for a temporary purpose.

XI. And these plaintiffs further show that the further diversion of the waters of said river by the defendant by means of the dams and enlargement of said slough as aforesaid, will be an unreasonable and unjust diversion, and will result in great and irreparable loss and damage to these plaintiffs. That if the defendant is permitted to deepen, enlarge and dig out said slough as she now threatens and intends to do, and in fact is engaged in doing, and is permitted to draw the waters of said slough around the easterly side of said Hunter's Island, through the Lost Channel, she will compel a large proportion of the waters of said river, to-wit, upwards of two-thirds, to flow into and down said slough to her mill, and the waters in the main channel of said river, and running to the mills and premises of these plaintiffs, will be so greatly diminished in quantity as to be entirely insufficient and inadequate for hydraulic purposes, and it will be utterly impossible for plaintiffs to run and operate their said mills during a considerable portion of each year.

XII. And plaintiffs further show that their said water powers, mills, mill sites and riparian rights, will be greatly injured and damaged if the defendant is permitted to complete said works and divert the water as aforesaid, and they will suffer great and irreparable loss and damage in being thus deprived of the flow of said stream. That they have no adequate remedy at law, and therefore pray the aid and judgment of the equity powers of this court:

That the defendants be perpetually enjoined and restrained from in any manner or by any means turning or diverting the waters of said river from the main channel thereof at

the head of Big Island into said slough on the westerly side of said Island;

From digging out, deepening or enlarging said slough and channel in any manner;

From causing the waters in said slough at and above said Hunter's Island to flow on the easterly side thereof through or down said Lost Channel, to her mill.

That she be enjoined and restrained from in any manner interfering with the natural flow of the waters of said river upon or adjoining the premises of the said plaintiffs, and that the plaintiffs have such other and further relief as may be just, and that they recover costs.

Further, plaintiffs pray a temporary injunction pending the trial of this action as above, and restraining the defendant from trespassing upon said plaintiffs' lands at the head of said Big Island.

O.... P....

Plaintiffs' Attorney.

[*Verification.*]

1295. Complaint in equity for a continuing trespass caused by building and maintaining a stone foundation wall on plaintiff's lot (sustained in *Rahn v. M. E. R. & L. Co.*, 103 Wis. 467).

The plaintiff above named complains of the defendants above named, and for cause of action alleges:

I. That the defendant, the L.... M.... street railway company is a street railway corporation organized and existing under the laws of this state, and prior to the year 19.. was and still is the owner of and engaged in operating a street railway in the city and county of, in the state of

II. That the plaintiff herein is the owner of and has an estate in fee simple in and to the following described land situate in the city and county of and state of, to-wit [describe lots], which said lots have thereon two two-story frame buildings and one one-story frame building, which said buildings are on the northerly line of said lots and cover the same nearly or quite to the north line thereof, and that the plaintiff is now in possession of the said lands and buildings, and that she and her immediate grantors have been in possession thereof for twenty-eight years last past.

III. That in the year 19.. the said defendant was, and still is, the owner of lots two and three, and four, etc., in said block, the said lots numbered five and belonging to the said

L.... M.... street railway company adjoining the premises of the plaintiff on the northerly line thereof.

IV. That in the said year 19.. the said defendant erected upon its land a large brick building about forty feet in height, and covering all its lands, which said building was to be used as a repair shop for the repairing of its cars, machinery and appliances used in operating its lines of street railway, and in erecting said building, and for the purpose of laying a foundation wall therefor, excavated the ground along the south line of its said lots numbered five and adjoining the premises of the plaintiff to the depth of several feet, and below the foundation walls of the buildings of the plaintiff erected and then standing upon her said lots, ..., etc., and excavated beneath and undermined the foundation wall sustaining the said buildings of the plaintiff, and dug into and removed the soil from the premises of said plaintiff, without the plaintiff's consent, and without her consent and against her protest, built, erected and caused to be built and erected upon its said lands and upon the lands of the said plaintiff a heavy foundation wall of stone, three feet or more in thickness, which said foundation wall and the footing stones of the same extend into and upon the premises of said plaintiff and extend underneath the foundation wall sustaining the said buildings of the said plaintiff for a distance, varying from five to nine inches and upwards along the whole northerly line of said lots numbered, ..., etc.

V. That by reason of the undermining of the foundation wall of the buildings of the said plaintiff and the removal of the soil thereof, as aforesaid, the plaintiff's buildings sank down and settled, throwing the said buildings out of plumb, and caused the same to pitch and lean to the north, cracking and breaking the plastering in the said buildings, causing the cellar walls of said buildings to cave in and the floors of said buildings to sink down, and so wrenching and straining the said buildings as to prevent the doors thereof from opening and shutting until the same were rehung and changed, to the great damage of the said plaintiff and her said buildings, to-wit, in the sum of dollars.

VI. The plaintiff further alleges that the said defendant, the L.... M.... street railway company, claims the right to keep and maintain, and does still keep and maintain, the said foundation wall of its said building upon the premises of the said plaintiff, and refuses to take down and remove the same or any part thereof therefrom.

VII. That the said described lands of the said plaintiff are of great value, are situate in the business district, and are quite

suitable for business purposes, and that it was and is the intention of the plaintiff, as soon as she is able to do so, to erect thereon a brick building, covering said lots, for business purposes, but that she is and will be prevented from occupying and using the whole of said land for such purpose by reason of the intrusion of the foundation wall of the defendant's said building thereon, and that the value of her said lands is greatly diminished, and the same made unsalable, and the plaintiff greatly damaged in consequence, to-wit, in the sum of dollars.

VIII. That the said lot of said plaintiff has a frontage of feet on avenue, and that said lot which adjoins said lot on the west, has a frontage of feet on street, in said city of, making a strip of land feet in width extending through the center of said block from avenue to street, and that a frontage of feet upon a business street is the smallest frontage salable or available for business purposes, and that any reduction of the frontage of a lot below feet largely diminishes and destroys the value thereof, and that the said foundation wall of the said defendant's said building extending into and upon her lands as aforesaid and underneath the foundation walls of her buildings erected thereon deprive her of the full use, occupation and enjoyment of said lot, and will prevent her and her grantees and assigns from using and occupying the same for the purpose of building and erecting a foundation wall to sustain the buildings now or hereafter erected thereon.

IX. The plaintiff further alleges that the points and places where the said foundation wall of the defendant's building extends into and upon the lands of the plaintiff as aforesaid is below the surface of the earth and below the foundation wall of her buildings standing thereon and said foundation wall of defendant's building cannot be cut off and removed from the plaintiff's land from the plaintiff's premises without taking away and removing the soil, and tearing down and removing the foundation wall of her buildings erected and standing upon her lands, and that the removal and cutting off of the said foundation wall of the defendant's building extending from the plaintiff's premises would entail upon the plaintiff great cost, damage and expense.

WHEREFORE the plaintiff demands judgment that she may be adjudged and decreed to be the owner of said lots and of block in subdivision in the ward of the city of in fee simple, and as such owner entitled to the free and full use and occupation thereof without let,

hinderance or obstruction by the said defendants, or either of them.

2. That the foundation wall of the defendant's building, so far as it extends into and upon the lands of the said plaintiff and underneath the foundation walls of the buildings standing upon the plaintiff's lands, be adjudged and decreed to be an unlawful encumbrance and obstruction thereon, and that the said defendant be adjudged and directed within a certain time to be in said judgment ascertained and limited to remove the same therefrom without removing or digging up the soil of the said plaintiff or trespassing upon her premises for the purpose of so doing.

3. That the said defendant be decreed and directed by said judgment to replace upon the premises of said plaintiff the soil and other material unlawfully removed therefrom in such manner as to sustain the plaintiff's building and the foundation walls thereof.

4. That the plaintiff be further adjudged and decreed to have and recover from the said defendants such damages as she may be found to have suffered by reason of the premises, together with the costs and disbursements of this action, and that she have such further and other relief in the premises as to the court may seem just and equitable.

O.... P....

Plaintiff's Attorney.

[*Verification.*]

1296. Complaint against surety company upon an undertaking given to release garnishment, and pay judgment under Wis. Stats. 1898 sec. 2771 (from complaint in *Wilkinson v. U. S. F. & G. Co.*, 119 Wis. 226).

I. That the defendant was, at the dates and times hereinafter mentioned, and now is, a corporation, of, organized pursuant to the laws of the state of and authorized to do business as a surety company under the laws of the state of

II. That on the day of, 19.., the plaintiff, A.... B.... commenced an action against one E.... F.... in the court of the county of in the state of, and one G.... H.... was garnished in said action, an affidavit and summons in garnishment in said action being served upon said G.... H.... on the day of, 19..

III. That thereupon the said principal defendant E.... F.... desiring to have the said garnishment released, applied to

the court for an order fixing the terms of the undertaking to be given to procure such release.

IV. That the said court, by an order dated, 19. . . , fixed the terms of the undertaking for such release, as follows: That upon the principal defendant filing an undertaking in the office of the clerk of the said court of county to the effect that the sureties would pay on demand to the plaintiff the amount of the judgment with all costs that might be recovered against such defendant not exceeding the sum of dollars, that then the said garnishment up to the amount of said dollars, should be released.

V. That pursuant to said order the said defendant, on the day of, 19. . . , executed and filed an undertaking in the office of the clerk of said court whereby it undertook, covenanted and agreed that it would on demand pay to the plaintiff A. . . . B. . . . the amount of the judgment with all costs that might be recovered against the said defendant E. . . . F. . . . in said action, not exceeding the sum of dollars, a true copy of which undertaking is hereto annexed, marked "Exhibit A," and made a part of this complaint.

VI. That on the day of, 19. . . , the said plaintiff A. . . . B. . . . recovered judgment against the said defendant E. . . . F. . . . in the sum of dollars, no part of which has been paid.

VII. That on the day of, 19. . . , the plaintiff in this action demanded of the defendant herein the payment up to the amount of dollars, but the said defendant neglected and refused to pay said judgment or any part thereof, and still neglects and refuses to do so.

WHEREFORE plaintiff demands judgment against the defendant for the sum of dollars, with interest from the day of, 19. . . , together with the costs of this action.

O. . . . P. . . .

Plaintiff's Attorney.

[Verification.]

1297. Complaint by creditor of deceased person to reach lands purchased by deceased, and conveyed to another, and subject them to a trust in favor of creditors, under Wis. Stats. 1898 sec. 3835 (sustained in Allen v. McRae, 91 Wis. 226).

The above named plaintiff, for her cause of complaint respectfully shows to the court, and alleges in behalf of herself and the other creditors of L. . . . M. . . . deceased:

I. That one L. . . . M. . . . , being at the time wholly insolvent

and indebted to this plaintiff and others, did on the day of, 19.., purchase from one X.... Y...., and W.... Y...., her husband, the following described land and real estate, situate in the city of, in the county of and state of, described as follows, to-wit [*describe land*]. That the said L.... M.... paid and advanced the entire consideration and purchase money of the land and real estate above described, but caused the title thereto to be conveyed to the said C.... D...., the above named defendant, by good and sufficient warranty deed in the usual form by the said X.... Y.... and W.... Y.... instead of himself, and the said C.... D.... became vested with the legal title thereto; that said transfer to said C.... D.... of said land and real estate was made and intended to be in secret parol trust for the sole use and benefit of said L.... M.... pursuant to an agreement and understanding existing between said L.... M.... and said C.... D.... for the sole purpose and with intent to injure, hinder, delay and defraud the creditors of the said debtor L.... M...., so that the said above described property and real estate so fraudulently conveyed, as aforesaid, could not be subjected to the payment of the debts of the said L.... M....; that the legal title to the above described land and real estate has continued to remain in the said C.... D.... ever since the day of, 19.., in fraud of the existing creditors of said L.... M....; that said defendant E.... D.... was and is the husband of the defendant C.... D.... and acted as her agent in all of her dealings with the said L.... M.... and at all of the times herein mentioned the said defendants C.... D.... and E.... D.... have resided and still do reside in the city of

II. That the said L.... M...., at the time, was indebted to this plaintiff in the sum of dollars, and was indebted to divers other parties, and continued up to the time of his death, ..., 19.., to be wholly insolvent; that on the day of, 19.., this plaintiff duly filed her claim, as provided by statute, against the estate of L.... M.... in the court of county, and that on the day of, 19.., said claim came up for hearing, and after a trial on its merits judgment was rendered in this plaintiff's favor for the sum of dollars; that of that sum of dollars there was due and owing to this plaintiff at the time of the transfer of the heretofore described property to the said C.... D.... the sum of dollars.

III. That O.... P.... has been duly appointed and is now the administrator of the estate of the said L.... M...., deceased, and that as such administrator no funds belonging to

said estate have come into his hands, and that there is no property belonging to said defendant out of which this plaintiff can collect her claim.

IV. That on the day of, 19.., an execution by leave of court was duly issued out of the court of county, on a judgment rendered in an action in which R.... S.... was plaintiff and L.... M.... was defendant, and on the day of, 19.., said execution was duly returned wholly unsatisfied, showing the estate of the above named L.... M.... to be wholly insolvent; that this plaintiff brings this action in behalf of herself and all the other creditors of L.... M.... whose claims existed at the time of the transfer of said above described lands and real estate to the defendant C.... D...., to-wit, on the day of, 19..

WHEREFORE, plaintiff asks that the defendant C.... D.... be adjudged a trustee of the above-described land and real estate for the benefit of this plaintiff and the other existing creditors of the said L.... M.... at the time of said above-mentioned conveyance, and that the court appoint a receiver to take and sell said property or so much thereof as may be necessary to pay the existing creditors of the said L.... M...., and that the said creditors be called in and an order made for the payment of their said claim, and that the said defendants E.... D.... and C.... D.... be required to account for the rents and profits of said real estate to said receiver, from the day of, 19.., if the same shall be necessary to pay this plaintiff's claim with interest and costs of this action, together with the claim of the other existing creditors, with interest on the same, and to grant such other or further relief or judgment as to the court may seem just and equitable.

1298. Complaint to enjoin use of trademark and label, and to recover damages (sustained in *Leidersdorf v. Flint*, 50 Wis. 401).

I. That the above named plaintiffs are co-partners in trade doing business under the firm name and style of A.... B.... & Co., at the city of and elsewhere, and as such are manufacturers and dealers in tobacco.

II. That during all the time the said firm of A.... B.... & Co. has been in existence, they have manufactured and sold a special article of smoking tobacco, put up in packages of a certain form in paper wrappers of a particular color and mark, and stamped with the words and name "Nigger Hair Smoking Tobacco," and otherwise distinctively marked and designated, as hereinafter set forth.

III. That during all the said period of years they have exclusively used and are now using, and had, and still have the right so to use the said name and mark hereinafter more particularly described, as a trademark for such smoking tobacco; and that no other person than the said firm has at any time had the right to make use thereof or of any like mark or name, or of any near resemblance thereto.

IV. That at the present time and for many years last past, the plaintiff's said firm have packed such tobacco in yellow wrappers on which were printed in black ink the words [*here describe label particularly and fully*]. That these words and marks, together with the vignette so printed and stamped on packages and labels as herein stated, and the general disposition and arrangement thereof as set forth, constitute, and during the period aforesaid have constituted the proper trademark of the said firm of A. . . . B. . . . & Co., and the same has during said period been, and is now, used and employed by them, both upon said packages of smoking tobacco and upon labels and cards affixed to boxes and cases containing the same, and to exhibit for advertising said tobacco, as the peculiar and proper trademark of the said A. . . . B. . . . & Co.

V. That by reason of the long experience, industry, honesty and great care of said plaintiffs' firm in their business, and the good quality of their said smoking tobacco, and the peculiar and distinct features of their said trademark, the said "Nigger Hair Tobacco" has become widely and familiarly known to the trade throughout various portions of the country as an excellent and reliable article of smoking tobacco, and has acquired a high reputation as such, and has commanded, and still commands very extensive sales, which are a source of great profit and revenue to these plaintiffs.

VI. That the said smoking tobacco is known to the trade and to the public and to the buyers and consumers thereof by the name of "Nigger Hair Smoking Tobacco," and by the plaintiffs' own peculiar device and trademark aforesaid.

VII. That the said tobacco is a low priced tobacco, and is to a very large extent bought and consumed by a class of people who cannot read, and whose necessities and manner of living do not require them to practice more than ordinary caution when purchasing the commodities most frequently procured; and to this class of people the said tobacco has become known and is easily recognized largely by reason of the said peculiar and distinctive trademark aforesaid, a copy or specimen of which, upon one of said paper wrappers, is hereto attached and marked "Exhibit A," and to which reference is here made.

VIII. And the plaintiffs further allege that notwithstanding the long and quiet use and enjoyment by said A.... B.... & Co. of said trademark, the defendant C.... D...., well knowing and understanding these plaintiffs' rights, but wilfully disregarding the same, at some time in the year 19.., the precise date whereof is unknown to plaintiffs, devised, prepared and executed, or procured to be devised, prepared and executed, a certain device and paper wrapper and show cards in imitation and counterfeit of those of the plaintiffs hereinbefore described, and then and since then has and does manufacture and sell and offer for sale a certain grade of smoking tobacco similar in many respects to that of the plaintiffs, but inferior thereto in quality, and has and does offer for sale the same in the wrappers last aforesaid, put up in packages of the form, style, color and general appearance of the said "Nigger Hair Tobacco" of the plaintiffs, and has sold and still continues to sell the same in large quantities within the state of and elsewhere, thus labelled, marked and made up in imitation of plaintiffs' said trademark and packages.

IX. That said defendant, until about the day of, in the year 19.., employed in his said imitation and counterfeit of plaintiffs' trademark, marks and devices of such striking and close resemblance thereto, both in the vignette aforesaid and in the marks and letters about the same and otherwise, that the distinction and difference between plaintiffs' trademark and defendant's said imitation could be, and is, discovered and noticed only by the most cautious and wary purchaser and consumer of tobacco, and would scarcely be discerned at all by persons practicing ordinary observation, or whose attention had not been specially directed thereto. That defendant's said imitation contains the words "Big Indian" at the corresponding place in the label as the words "Nigger Hair" of plaintiffs' mark, having the letters thereof of such arrangement and construction and form, as greatly to resemble the words "Nigger Hair" of plaintiffs' label, and above these words is the vignette of a black savage closely resembling in general effect and general appearance the vignette of plaintiffs' trademark, both in size, color, position, ornamentation, facial angle presented, and idea; a copy or specimen of which upon one of the said wrappers is hereto attached and marked "Exhibit B," and particularly referred to.

X. And the plaintiffs further allege that the said defendant's said imitation has been so devised, prepared and executed, as to result in effecting the sale of the tobacco of the defendant as and for and instead of that of the plaintiffs' known as aforesaid, as "Nigger Hair," and to supplant the plaintiffs in their extensive

and profitable sales thereof. And although the plaintiffs have repeatedly requested the defendant to desist in his use of the said counterfeit and imitation, he has refused to do so, but has so continued to employ and use the devices and marks shown at "Exhibit B" until he has established his said counterfeit article of tobacco upon the market, and introduced it to the trade and public as a brand of smoking tobacco, which in appearance and for purposes of sale is readily and frequently mistaken, sold and bought for the said tobacco of the plaintiffs, and until he had in fact to the extent of his said sales supplanted the tobacco of the plaintiffs through said imitated marks and devices and the consequent deceit practiced upon the public thereby; and until he had so wrongfully attracted and diverted trade from the plaintiffs to himself by the means aforesaid.

XI. And the plaintiffs further say they are informed and believe that said defendant so as aforesaid continued to use said imitation of plaintiffs' trademark, until believing he could retain and keep the trade so as aforesaid already attracted and diverted to him, by means of further using a less close and striking resemblance to plaintiffs' trademark, he artfully contrived and executed certain changes in his said imitation of plaintiffs' trademark, so as to be able to assert the pretence and excuse that he had ceased using the imitation shown at "Exhibit B," whereas in fact the said modification and changes were not in the chief characteristic of said label and the same still presents to the public the impression and idea that the same is the badge or mark of the said plaintiffs, so as aforesaid described, and now does strongly resemble the plaintiffs' trademark in all its chief and most essential features. A copy of which said second device of the defendant, and a specimen of the same, together with the paper wrapper is hereto attached and marked "Exhibit C."

XII. And the plaintiffs further allege that the imitations aforesaid are calculated to deceive the general public and especially the small purchasers and consumers of tobacco, and that the form, size, color and devices of the packages of tobacco of the defendant are intended to be and are in such imitation of and resemblance to those of the plaintiffs and are contrived and calculated to, and actually do mislead the public in that regard, and cause among consumers the idea that the two articles of tobacco are identical, and are manufactured by the said plaintiffs.

XIII. And the plaintiffs further say that for several months last past, beginning at a date which is unknown to them, the defendant has manufactured and sold smoking tobacco in the packages of the kinds above described, and has, as they are informed and believe, put forth the same in the market, and has endeavored to procure others to sell and deal in the same, as the

identical "Nigger Hair" tobacco of the plaintiffs. And the plaintiffs are informed and believe that in many instances the said tobacco of the defendant has been sold as and for the said "Nigger Hair" tobacco on account of the similarity of the appearance of the packages and marks as hereinbefore stated.

XIV. And the plaintiffs further say that their said tobacco had come to be very favorably known, and largely bought and consumed in the state of and elsewhere, and that at the time when the defendant first began to sell tobacco in packages imitating those of the plaintiffs, the amount of the plaintiffs' sales was very large and constantly increasing, and their trade in said tobacco was very extensive and profitable. And that the defendant has greatly injured and damaged the plaintiffs in their said business by his sales of the said imitation of their "Nigger Hair" tobacco, both because they have diminished the amount of the sales so heretofore made by the plaintiffs of their said tobacco, and because the defendant has thereby placed upon the market an article of tobacco now extensively dealt in by the trade, which closely resembles in the size, color and general appearance of the packages in which it is sold by the defendant, and in the marks upon the same, the said packages manufactured and sold by the plaintiffs, and which is of an inferior quality thereto, and which, as aforesaid, is frequently mistaken for the tobacco of the plaintiffs for the reasons aforesaid, and has thereby injured the reputation of the plaintiffs' said tobacco among those who purchase or have purchased defendant's said tobacco, supposing it to be that manufactured by the plaintiffs.

XV. And the plaintiffs further say that before the commencement of this action they requested the defendant to desist from using both of said imitations above described and from their said infringement of plaintiffs' trademark, and to pay to the plaintiffs what upon a just accounting there would be due to them therefor, but the defendant refused so to do, and still continues to manufacture and sell such tobacco put up and stamped in imitation of the plaintiffs' trademark as aforesaid and in disregard and violation of their rights, and thus threatens to cause irreparable injury to the plaintiffs.

XVI. And the plaintiffs further say that by reason of the premises and of the aforesaid acts and doings of the said defendant, they have been injured to their damage dollars.

WHEREFORE the plaintiffs demand judgment against the defendant:

1. That the said defendant, his agents and servants may be perpetually enjoined from using the marks and devices now used by him or heretofore used by him, and shown by copies as "Exhibit B" and "Exhibit C," and from using any other marks,

names or letters in imitation of the plaintiffs' trademark, or of any resemblance thereto.

2. That the defendant make full and true and perfect account of all the profits of every description, which he has made or might have made upon sales of smoking tobacco made by him or his agents wherein the packages of tobacco sold bore any device or marks similar to or like plaintiffs' trademarks; and that he be adjudged and decreed to pay over all of such profits to the plaintiffs.

3. For the sum of dollars.

4. For the costs of this action, and for such other and further relief as to the court shall seem just.

1299. Complaint by grantee of real estate, whose deed was unrecorded, against grantor for conveying same to an innocent purchaser (sustained in *Ring v. Ogden*, 45 Wis. 303).

I. That on and prior to the day when the deed first herein-after mentioned was executed and delivered, C.... D...., the defendant in this action, was the owner in fee simple of the following described real estate, situate, lying and being in the county of and state of, and known and designated as so much of [*give description*].

II. That on or about the day of, 19.., the defendant, by his certain warranty deed of that date, executed by himself and wife, under their hands and seals, and duly stamped according to the act of congress in such case made and provided, and delivered to one J.... K...., of the city of, conveyed said real estate to said J.... K.... in fee simple.

III. That afterwards, and on or about the day of, 19.., the said J.... K.... by his quitclaim deed of that date, executed by himself and his wife under their hands and seals, and delivered to the plaintiff, conveyed said real estate in fee simple.

IV. That neither of the aforesaid deeds have ever been recorded in the office of the register of deeds of county.

V. That afterwards, and on or about the day of, 19.., the defendant, well knowing that he had parted with said real estate as aforesaid, and that he had no longer any interest therein, fraudulently and wrongfully and by means of his certain quitclaim deed of that date, executed by himself and his wife under their hands and seals, conveyed the same real estate to one L.... M...., which deed was recorded in the office of the register of deeds of county, on the day of, 19.., on page of volume of the Records of Deeds in

said office; that said defendant having previously, and on or about the day of, 19.., well knowing that he had parted with said real estate as aforesaid, and that he no longer had any interest therein, fraudulently and wrongfully and by means of his certain warranty deed of that date, executed by himself and his wife under their hands and seals, conveyed the same real estate to the same L.... M...., which deed was also recorded on the day of, 19.., on page of volume of the Records of Deeds, in said office of the register of deeds of county.

VI. That afterwards, and on or about the day of, 19.., the said L.... M.... by his warranty deed of that date, executed by himself and his wife under their hands and seals, conveyed the same real estate to R.... S....

VII. The plaintiff alleges, upon his information and belief, that the said R.... S.... when the deed last aforesaid was executed and delivered to him, had no knowledge or information of said unrecorded deeds or either of them; and the plaintiff further alleges that said real estate was then and there vacant and unoccupied, and that said R.... S...., by means of said last mentioned deed became an innocent purchaser of said real estate, and was and ever since has been the rightful, and legal owner thereof to the exclusion of the plaintiff's just rights therein. The plaintiff further shows that said last mentioned deed was recorded in the office of said register of deeds on the day of, 19.., on page of volume of the Records of Deeds in said office.

VIII. The plaintiff further shows that by reason of the aforesaid fraudulent and wrongful acts of the defendant, whereby the plaintiff lost and was deprived of the title of said real estate as aforesaid, he has suffered damage and loss to the amount of dollars, of which sum the defendant has paid to the plaintiff, in part satisfaction thereof, the sum of dollars, and no more.

WHEREFORE the plaintiff demands judgment of this court, that he recover of and from the defendant the sum of dollars, the balance remaining unpaid of his damages in the premises, and the costs of this action.

1300. Complaint for maliciously filing lis pendens and preventing sale of plaintiff's land (sustained in *Smith v. Smith*, 20 Hun, 555).

I. That at the times hereinafter mentioned the plaintiff was and still is the owner in fee of the following described premises in the city of, state of, viz [*describe premises*].

II. That the defendants, on the day of, 19..,

through their attorney duly authorized, filed or caused to be filed in the office of the register of deeds of the county of in said state, being the county in which said real estate is situated, a notice of the pendency of an action in the court, wherein the defendants herein were plaintiffs and this plaintiff and others were defendants, in which notice it was alleged that said last named action had been commenced and was pending, to recover the alleged interest of one G.... H.... in the said premises; that the complaint in said action was filed in the office of the clerk of said court on said day, and was referred to in said notice, and alleged and declared the said premises to be the property of said G.... H...., and that plaintiff's title thereto was fraudulent and void as against the plaintiffs therein, who alleged that they were judgment creditors of said G.... H....

III. That the said defendants, well knowing that plaintiff was in fact the owner of said premises, maliciously and without reasonable or probable cause, continued to cause it to be suspected that this plaintiff was not the owner of said premises, but that her apparent title thereto was fraudulent and void, and to prevent this plaintiff from effecting a sale thereof, wrongfully and maliciously, and without probable cause therefor or for the bringing of said action, caused said notice to be filed as aforesaid, and thereby gave notice to all the world of all the matters alleged in said notice and in said complaint.

IV. That the statements and allegations contained as aforesaid, in said notice, and in said complaint, charging that the plaintiff's title to said lands was fraudulent and void, were and are wholly false, and were made maliciously and without probable cause, and with the intent to injure the sale of said premises, as well as this plaintiff, and to prevent the sale of said premises.

V. That thereafter, and on the day of, 19.., the said notice of pendency of action was duly canceled of record, by order of said court, which order was duly made upon the application of the defendants, through their said attorney, whereby the said notice ceased to have any effect.

VI. That after the filing of said notice and before the same was canceled, as aforesaid, to-wit, on or about the day of, 19.., this plaintiff had a *bona fide* offer and could have sold said premises for the sum of dollars, to one J.... K...., but that in consequence of the filing of said notice, and the allegations contained therein and in said complaint, plaintiff was prevented from effecting a sale thereof to said purchaser, to the plaintiff's damage dollars.

WHEREFORE the plaintiff demands judgment for the said sum of dollars, with the costs and disbursements of this action.

